Supreme Court, U. S.
FILED
NOV 9 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

HOWARD SCHULMAN
DAVID JAFFE
Attorneys for Petitioners
1250 Broadway
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

OTTO E. SIMON
SIMON & WOOD
Mobile, Alabama

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Constitutional Provision Involved	4
Statement of the Case	4
The Parties	4
The Nature, Consequence and Purpose of the Picketing	5
The Litigation and the Manner in Which the Federal Question Was Raised	8
Reasons for Granting the Writ	10
Argument	12
I—The National Labor Relations Act preempts state jurisdiction to enjoin peaceful nonobstructive primary informational picketing of a foreign flag vessel in the United States by American seamen truthfully protesting the adverse effects of substandard wages and benefits paid by the foreign flag vessel on the domestic employment opportunities of American seamen and concurrently requesting the public not to patronize such vessel	12
II—Peaceful primary informational picketing to protest the loss of domestic jobs to foreign flag vessels paying substandard wages and benefits was an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama Court	15
Conclusion	21
Certificate of Counsel	23

INDEX TO APPENDIX

(Separately Bound)

APPENDICES	PAGE
A. Statute Involved	1a
B. Constitutional Provisions Involved	4a
C. Opinion of Supreme Court of Alabama	5a
D. Denial of Rehearing, Supreme Court of Alabama	27a
E. Order for Injunction	28a
F. Notice of Appeal	31a
G. Original Bill of Complaint	33a
H. Complaint of Intervention	42a
I. Demurrer	52a
J. Pleas	53a
K. Answer	55a
L. Assignment of Errors	57a
M. Minutes of Hearing, Circuit Court of Mobile County, Alabama	59a
Complainant's Evidence	
Affidavit of W. D. Walsh	61a
Affidavit of John T. Murray, Jr.	63a
Affidavit of E. Rob Leatherbury	65a
Affidavit of J. R. Macpherson	67a
Intervenor's Evidence	
Affidavit of Mrs. J. C. Bohanon	77a
Affidavit of Robert C. Malone	79a

	PAGE
Respondents' Evidence	
Stipulation	81a
Testimony of J. R. Macpherson, Direct	82a
Cross	88a
Exhibit B—Leaflet Distributed by Pickets	91a
Affidavit of Louis Neira	92a
Testimony of Louis Neira, Direct	106a
Exhibit E—Instructions to Pickets	113a
Cross (Complainant)	115a
Cross (Intervenor)	130a
Redirect	141a
Recross	142a

TABLE OF AUTHORITIES

PAGE

Cases:

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) 16, 17, 20
American Federation of Labor v. Swing, 312 U.S. 321 (1941) 17

Bakery Drivers Union v. Wohl, 315 U.S. 769 (1942) 17
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) 9, 10, 12

Cafeteria Employees v. Angelos, 320 U.S. 293 (1943) 17
Carlson v. California, 310 U.S. 106 (1940) 16, 18
Chase v. Robson, 435 F.2d 1059 (7 Cir. 1970) 20

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 (1953) 11, 14
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 17
Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774 (D. C. Cir. 1967), cert. den. 389 U.S. 932 13

Hotel Employees Union v. Sax Enterprises, 358 U.S. 270 (1959) 14
Hughes v. Superior Court, 339 U.S. 460 (1950) 17

Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963) 9, 10, 12
International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950) 18
International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) 17
International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co., Ltd., 397 U.S. 195 (1970) 10, 13, 14, 15
International Wood Workers of America (T. Smith & Sons, Inc.), 125 NLRB 209 (1959) 13

PAGE

Local 761, International Union of Electrical, etc. v. N.L.R.B., 366 U.S. 667 (1961) 19–20

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7 Cir. 1964), cert. den. 379 U.S. 967 13
Marine Cooks and Stewards Union v. Panama S.S. Co., 362 U.S. 365 (1960) 10, 13
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 9, 10, 12

N.L.R.B. v. Fruit and Vegetable Packers, 377 U.S. 58 (1964) 18

Pocatello Building & Construction Trades Council v. C. H. Elle Const. Co., 352 U.S. 884 (1956) 14
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 17
Port of Houston Authority, etc. v. International Organization of Masters, Mates, etc., *et al.*, 456 F. 2d 50 (5 Cir. 1972), cert. den. 409 U.S. 894 (1972) 5

Retail Clerks Local 560 v. J. J. Newberry Co., 352 U.S. 987 (1957) 14

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 11, 14
Seafarers International Union v. N.L.R.B., 265 F.2d 585 (D. C. Cir. 1959) 19, 20

Thornhill v. Alabama, 310 U.S. 88 (1940) 11, 16, 17, 18

United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956) 14
United Steel Workers v. N.L.R.B., 376 U.S. 492 (1964) 20

PAGE

Washington-Oregon Shingle Weavers' Council (Sound Shingle Co.), 101 NLRB 1159 (1952) 13
Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955) 14
Windward Shipping (London) Limited, *et al.* v. American Radio Association, AFL-CIO, *et al.*, 482 S.W. 2d 675, cert. granted, No. 72-1061 ..... 5, 11
Wood v. Georgia, 370 U.S. 375 (1962) 20

Other Authorities:

National Labor Relations Act:
§7, 29 U.S.C. §157 ..... 4, 13, 14
§8, 29 U.S.C. §158(b)(4) 4, 8, 13, 15

28 U.S.C. §1257(3) 2
29 U.S.C. §187 8

United States Constitution:
First Amendment 9, 15, 18, 21
Fourteenth Amendment 3, 9, 15, 21

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners, American Radio Association, AFL-CIO, International Organization of Masters, Mates and Pilots, AFL-CIO, National Marine Engineers Beneficial Association, AFL-CIO, National Maritime Union of America, AFL-CIO, Radio Officers Union of the United Telegraph Workers, AFL-CIO, Seafarers International Union of North America, AFL-CIO, Price L. Mitchell, Charles D. Malloy, Layton Overstreet and Louis Neira, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered on May 3, 1973.

Opinions Below

The opinion of the Supreme Court of Alabama, dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is set forth at pages 5a-26a of Appendix C and is reported at 279 So. 2d 467.

The denial by the Supreme Court of Alabama, dated July 5, 1973, of the application for rehearing, which was entered without opinion, is set forth at page 27a of Appendix D.

The order for injunction of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth at pages 28a-30a of Appendix E; that court issued no opinion, finding of fact or conclusion of law.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

The order of the Supreme Court of Alabama issued and was entered on May 3, 1973 (Appendix C, pages 5a-26a). An application for a rehearing was denied on July 5, 1973 (Appendix D, page 27a). Petitioners' application for an extension of time in which to file the present petition for a writ of certiorari was granted by Mr. Justice Powell, Jr. by order dated September 18, 1973, which order extended the time for filing of this petition to and including November 9, 1973.

Questions Presented

The state court injunction prohibited peaceful primary informational picketing of foreign flag vessels in the Port of Mobile. The picketing, in the nature of a "Buy American" campaign, protested the loss of jobs of American seamen to foreign flag vessels paying substandard wages and benefits. The picketing was conducted by a group of American maritime unions which did not seek to represent, organize or support the crews of the foreign flag vessels. Some American workers voluntarily refused to cross the picket line. The complainants were an association comprising local stevedoring companies and shipping companies in the Port of Mobile and a local farmer whose produce was shipped through that port. The injunction was issued without any opinion, finding of fact or conclusion of law. The questions thus presented are:

1. Whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board.

2. Whether the prohibition of peaceful informational picketing abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution.

Statute Involved

Petitioners contend that their peaceful informational picketing was protected by §7 of the National Labor Relations Act, 29 U.S.C. §157, as "concerted activities for the purpose of * * * mutual aid or protection * * *" or, if not so protected, then prohibited or arguably prohibited by §8 of that Act, 29 U.S.C. §158(b)(4), and in either event that the statute wholly preempts state judicial regulation of the picketing. The pertinent provisions of the National Labor Relations Act are set forth at pages 1a-3a of Appendix A.

Constitutional Provisions Involved

Petitioners contend that peaceful informational picketing was an exercise of freedom of speech protected by the First Amendment as it is incorporated in the Fourteenth Amendment of the Constitution and consequently not subject to any abridgment. The Constitutional provisions are set forth at page 4a of Appendix B.

Statement of the Case

The Parties

The union petitioners are members of the Committee of American Maritime Unions which consists of American unions representing American seamen on American flag vessels; the individual petitioners are members of the union petitioners; the individuals participated in the picketing under instructions from the Committee of American Maritime Unions at the Port of Mobile in November

of 1971. That picketing was undertaken by the Committee on a selective nationwide basis to protest the enormous loss of jobs of American seamen to foreign flag vessels paying substandard wages and benefits in contrast to those paid to American seamen (92a-95a).

Identical selective picketing by the same unions using identical picket signs and distributing identical leaflets is now before this Court pending argument in *Windward Shipping (London) Limited, et al., Petitioners,* v. *American Radio Association, AFL-CIO, et al., Respondents,* No. 72-1061, bringing up for review the decision of the Texas court in 482 S.W. 2d 675, holding that the subject matter was preempted by the National Labor Relations Act. Identical selective picketing by the same unions using identical picket signs and distributing identical leaflets was before this Court in *Port of Houston Authority, etc.* v. *International Organization of Masters, Mates, etc., et al.,* 456 F. 2d 50 (5 Cir. 1972), cert. den. 409 U.S. 894 (1972) wherein the Fifth Circuit held that restraint of the picketing there was prohibited by the Norris-LaGuardia Act.

The respondent Association is comprised of local employers; the individual respondent is a local farmer.*

The Nature, Consequence and Purpose of the Picketing

At the time of the injunction hearing in the Circuit Court of Mobile County, petitioners were peacefully picketing two foreign flag vessels with picket signs (6a)

* In *Port of Houston Authority, supra,* the unsuccessful plaintiff was also an association of local employers of longshoremen. In *Windward Shipping, supra,* the unsuccessful plaintiffs were owners, operators or agents of foreign flag vessels.

and were distributing leaflets (7a) advising of the loss of jobs of American seamen, requesting the public not to patronize the foreign flag vessels, and requesting the public to patronize American flag vessels. The picket sign was as follows:

"ATTENTION TO THE PUBLIC

"The wages and benefits paid aboard the vessel SS Aqua Gloria and the SS Bel Hudson are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.

"Please do not patronize these vessels. Help the American seamen.

"We have no dispute with other vessels at this site."

The names of the picketing unions appeared beneath the quoted matter.

The leaflet distributed was as follows:

"TO THE PUBLIC

"American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute here is limited to the vessel picket at this site, the SS ".

The names of the unions again appeared at the bottom of the leaflets. The name of the vessel was inserted in the blank space.

The picketing was peaceful, taking place inside the State Docks by permission (96a) after the picketing had commenced at the gates. Some waterfront employees crossed the picket line and some refused to cross the picket line (96a, 116a, 123a). It is undisputed that there was no mass picketing, no blocking of ingress or egress, no assaults, no coercion, no threats, and no shouting (8a, 96a). The only act complained of, except for the peaceful informational picketing, was that the unions "have also directed employees of other employers * * * to refuse to provide any work or services with respect to such vessels." (37a—¶19 of Association complaint). It is uncontroverted, however, that the only things "directed" at any employee of the stevedoring companies were the picket signs and leaflets distributed by mute pickets (8a, 143a, 144a).

The picketing was "low profile". At the time of the hearing only two foreign flag vessels were being picketed by four or five pickets. To the gratification of the pickets, cargo operations on the two vessels ceased because some American longshoremen refused to cross a picket line of American seamen protesting the loss of American jobs.

The purpose of the picketing was as stated on the picket signs and on the leaflets distributed by the mute pickets.

The trial court did not find that the picketing was conducted by any unlawful method or for any unlawful purpose. The Supreme Court of Alabama nevertheless held that the purpose of the picketing was unlawful because the unions hoped that the picket lines would be honored by American workers (and one union member, Neira, expressed a similar hope with considerable enthusiasm from the witness stand, although not on the picket line), and that the honoring of the picket line would and did result in damage to the complainants, which was anticipated by petitioners.

The Litigation and the Manner in Which the Federal Question Was Raised

Petitioners first sought to raise a federal question by removal to the United States District Court for the Southern District of Alabama, Southern District (Certified Transcript, pages 9-11). The petition for removal stated that the complaint in the state court action alleged a secondary boycott comprehended by §303 of the Taft-Hartley Act, 29 U.S.C. §187, a provision allowing an independent action for damages for acts which were denominated unfair labor practices under §8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4). That attempt to raise the federal question was aborted by the order granting remand (Certified Transcript, page 13).

Thereafter, petitioners raised the federal question of preemption, that the picketing was either protected or prohibited or arguably prohibited by the National Labor Relations Act, and that the relief sought forbade the exercise of the federal right to engage in concerted activities for mutual aid or protection. Additionally, petitioners

raised the question that the relief sought would prohibit peaceful informational picketing in violation of the First Amendment as incorporated in the Fourteenth Amendment. Those questions were raised in the demurrer (52a); the pleas (53a, 54a); and the answer (55a, 56a). And those questions were raised on appeal to the Supreme Court of Alabama in the assignment of errors (57a, 58a).

The order for injunction of the District Court of Mobile County (28a-30a) restrained "interference" and picketing at or near premises owned, occupied or used by members of the respondent Association. For all practical purposes, the area covered by the injunction included the entire Port of Mobile and included the picketing of any vessel flying any flag. The injunctive order of November 11, 1971, was issued without any accompanying opinion or finding of fact or conclusion of law. On appeal to the Supreme Court of Alabama, that court made valiant attempt to salvage the injunction by stating:

> "The trial judge's decree, granting the writ of temporary injunction, made no finding of fact from the evidence. But *apparently* the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, *for otherwise, he would not have ordered the writ of temporary injunction to issue.*" (20a, 21a, emphasis supplied)

The Alabama Supreme Court held that there was no preemption because the National Labor Relations Act was inapplicable, reasoning that the picketing constituted an interference with the internal economy of the foreign flag vessels; reliance was upon the trilogy of cases of this Court, *Benz, Incres* and *McCulloch*, discussed *infra*. It also

held that, since there was a hope by the unions that longshoremen would not cross the picket line at the foreign flag vessels, and because this hope was realized, there was a tortious interference with the business of the stevedoring companies and the farmer.

Reasons for Granting the Writ

The Supreme Court of Alabama has disregarded or misconstrued controlling decisions of this Court on the question of whether or not picketing of a foreign flag vessel in an American port by American unions which do not seek to organize, represent or support the crews of the foreign flag vessels, constitutes an interference with the internal economy of the foreign vessel.

It was upon the Alabama court's determination that such picketing did interfere with the internal economy that it decided the question of preemption, holding the National Labor Relations Act wholly inapplicable, citing *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957), *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U. S. 24 (1963), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963). The Alabama court overlooked, however, the fact that this Court has twice held that there is no interference with the internal economy of a foreign flag vessel when the picketing union does not seek representation of or lend support to the crew of the foreign flag vessel. *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co., Ltd.,* 397 U.S. 195 (1970) and *Marine Cooks and Stewards Union* v. *Panama S.S. Co.,* 362 U.S. 365 (1960).

Absent the "red herring" of internal economy, the teaching of *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485 (1953) and *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) is inescapable. The acts complained of are either protected or arguably prohibited by the National Labor Relations Act. No other court or agency, state or federal, has jurisdiction of the subject matter.

The decision of the Alabama court is also in conflict on the question of preemption with the decision of the Texas court in *Windward Shipping, etc., et al.* v. *American Radio Association, et al., supra,* now pending argument in this Court.

We suggest that the Alabama Supreme Court erred grievously in holding that the picketing was not constitutionally protected freedom of speech, overlooking or misconstruing the line of cases beginning with *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). The escape from that authority was through the avenue of what we somewhat facetiously refer to as a new cause of action discovered in Alabama which may be denominated the "Tortious Hope". The Alabama court has reasoned that because peaceful primary informational picketing is effective, *i.e.,* American longshoremen refuse to cross a picket line of American seamen protesting loss of their jobs, and because the picketing unions hope that the picketing will be effective, and because stevedoring companies or farmers are injured in their business as a result, the picketing has somehow become unlawful. We suggest that the maxim *damnum absque injuria* is surely applicable. Otherwise, any effective peaceful picketing is *per se* unlawful. The result is an absurdity.

ARGUMENT

I

The National Labor Relations Act preempts state jurisdiction to enjoin peaceful nonobstructive primary informational picketing of a foreign flag vessel in the United States by American seamen truthfully protesting the adverse effects of substandard wages and benefits paid by the foreign flag vessel on the domestic employment opportunities of American seamen and concurrently requesting the public not to patronize such vessel.

The issue of preemption has been muddied by the injection of the contention that the object of the picketing was to interfere with the internal economy of the foreign flag vessels. That contention is a late starter, never having been pleaded as an unlawful objective. The only unlawful objective pleaded was the interference in the contractual relations between the stevedoring companies and the foreign flag vessels and thus the alleged interference with the rights of those companies to carry on a lawful business (37a—¶¶20 and 21 of Association complaint). But since the Supreme Court of Alabama has rested its holding on preemption on the ground of interference with the internal economy of the vessels, we turn to that issue.

The trilogy of *Benz, Incres* and *McCulloch,* all *supra,* stands for the proposition that the National Labor Relations Act is inapplicable when American unions seek to organize, represent or support the foreign crews aboard the foreign vessels. Such conduct interferes with the internal economy of the vessel—the employer-employee relationship between the owner or operator of the foreign flag vessel and the foreign crew. The Act was never intended to encompass that employer-employee relationship. On the other hand, *Marine Cooks and Stewards* and *Ariadne,* both *supra,* instruct that when the picketing of American unions is to preserve their job opportunities here in the United States, such conduct is not an interference with the internal economy of the foreign flag vessel; and *Ariadne* pointedly holds that such conduct by American unions is activity protected by §7. Petitioners relied below upon *Marine Cooks and Stewards* and *Ariadne,* but neither case was adverted to in the opinion of the Alabama Supreme Court.

At bar, the conduct was solely to preserve job opportunities here in the United States—conduct not directed to internal economy. It follows, then, that the issue of internal economy of the foreign flag vessels must be removed from this case; and the doctrine of preemption controls. We first address preemption under §8 of the Act.

The National Labor Relations Board has exercised its jurisdiction and implemented the provisions of the Act where the unlawful conduct has occurred within our nation, notwithstanding the fact that the primary employer and its employees were foreign. *Washington-Oregon Shingle Weavers' Council* (*Sound Shingle Co.*), 101 NLRB 1159 (1952) and *International Wood Workers of America* (*T. Smith & Sons, Inc.*), 125 NLRB 209 (1959). See also *Madden* v. *Grain Elevator Workers Local 418,* 334 F. 2d 1014 (7 Cir. 1964), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F. 2d 774 (D. C. Cir. 1967), cert. den. 389 U. S. 932; and the doctrine of preemption is

applicable whether or not there is a proximate employer-employee relationship, *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270 (1959); *Retail Clerks Local 560* v. *J. J. Newberry Co.*, 352 U.S. 987 (1957) and *Pocatello Building & Construction Trades Council* v. *C.H. Elle Const. Co.*, 352 U. S. 884 (1956). Congress has occupied the field of secondary picketing in commerce; Alabama may not trench upon the field.

As to §7 of the Act, it is now hornbook law that peaceful picketing for the purpose of mutual aid or protection is immune from state regulation. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, 246; *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485, 494. Apposite is the statement in that case that

> "* * * it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits." (346 U.S. at 500).

Accord: *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75 (1956); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474 (1955).

Finally, this Court in *Ariadne* foreclosed state regulation of picketing of a foreign flag vessel by American workers who protest substandard wages paid by the foreign flag vessel.

> "The jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities that

> are 'arguably subject' to regulation under §7 or §8 of the Act. * * * The activities of petitioner in this case met that test. The union's peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under §7." (397 U.S. at 200, 201).

The concurring opinion of Mr. Justice White in *Ariadne* highlights our contentions here. That opinion stated that the union's job preservation picketing was clearly not proscribed by §8 of the Act and "that the peaceful and non-obstructive picketing on the public docks near the ships was union activity protected under the National Labor Relations Act" (397 U.S. at 202). Thus, we need not be concerned with whether the picketing in the instant case was "arguably" protected; it was absolutely protected by the Act.

Clearly, picketing by petitioners in the instant case was not subject to state regulation. The jurisdiction of the Board is exclusive.

II

Peaceful primary informational picketing to protest the loss of domestic jobs to foreign flag vessels paying substandard wages and benefits was an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama Court.

Peaceful primary informational picketing, whether banned by state statute, municipal ordinance or, as in the instant case, by state court injunction, is protected by the First and Fourteenth Amendments as an aspect of freedom of speech. Such picketing does not lose its protection be-

cause it is exercised at the situs of the dispute, or because the pickets have no employment relationship with the party picketed, or because the pickets effectively persuade others not to patronize the picketing party, or because the picketing incidentally results in an interference with the carrying on of a business, either that of the party picketed or secondary or tertiary parties.

Picketing may be regulated by the state, sometimes banned completely, if its methods are not peaceful or if its purposes or objectives are not lawful. If the latter, however, the state must specifically identify the type of anti-social conduct it seeks to limit or prohibit. In the instant case, the trial court, having made no findings of fact or conclusions of law, has left us in the dark as to the conduct which it believed to have been anti-social.

The picketing of the foreign flag vessels was peaceful and was, therefore, constitutionally protected as an exercise of free speech. *Thornhill* v. *Alabama*, 310 U. S. 88, 102-104 (1940); *Carlson* v. *California*, 310 U. S. 106, 112, 113 (1940). Said the court in *Carlson*:

> "For the reasons set forth in the opinion in Thornhill v. Alabama, supra, publicizing the facts in a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." (310 U.S. at 113).

Recent reaffirmations of *Thornhill* are *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 313

(1968) and *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

It was again argued in *Thornhill* that the Alabama statute could be saved because its ban on picketing was limited to the situs of the dispute. The argument received short judicial shrift (310 U.S. at 105, 106).

The fact that petitioners were not employees of the foreign flag vessels to which their primary picketing was directed cannot result in their loss of their freedom of speech. A state court may not find an unlawful purpose because there is no employment relationship and thus, in its view, no labor dispute. *American Federation of Labor* v. *Swing*, 312 U.S. 321 (1941); *Bakery Drivers Union* v. *Wohl*, 315 U. S. 769 (1942). This aspect of the matter was finally put to rest in *Cafeteria Employees* v. *Angelos*, 320 U.S. 293, 295-296 (1943); this line of cases was cited with approbation in *Logan Valley Plaza*, 391 U.S. at 314, 315.

The opinion of the Alabama Supreme Court brushes aside *Thornhill* and its progeny with the old saw that picketing is "speech plus" (17a). It is clear, however, that there was no "plus" in the instant case by mute pickets patrolling at the foreign flag vessels. The Alabama court relied heavily upon the line of cases holding that if there is a valid state policy to protect, such as state anti-trust policy, prohibition of racial quota hiring or forced union shop, etc., picketing may be limited or banned altogether. *International Brotherhood of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284 (1957); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes* v. *Superior Court*, 339

U.S. 460 (1950); *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470 (1950). This line of cases need not detain us inasmuch as the Alabama court was unable to point to any valid state policy. The Alabama court did, however, argue that the honoring of the picket lines by employees of the stevedoring companies resulted in an unlawful interference with the businesses of the stevedoring companies and of Malone, the farmer.

This Court has time and again held that the mere fact that a primary picket line may result in injury or damage cannot be the basis for restriction upon picketing. *Thornhill*, 310 U. S., at 104, 105; *Carlson*, 310 U. S. at 112. Merely because picketing is effective and the public refuses to patronize does not render the picketing in any way unlawful, *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 72 (1964). That was the famous "Tree Fruits" case in which this Court held that a nationwide consumer boycott was not proscribed secondary activity despite the fact of damage to the primary and secondary parties; it noted, *inter alia*, that a ban on such secondary picketing "might collide with the guarantees of the First Amendment" (*id.* at 63).

In holding that the picketing was an interference with the right of the complainants to conduct business, the Alabama Supreme Court relied heavily upon the enthusiastic testimony of petitioner Neira. That testimony, fairly read, was his personal expression of what he hoped the picketing would accomplish. The Court did not rely, however, upon the totality of Neira's testimony. It quoted a few vagrant personal expressions of his hope that the picketing would

be effective. The Alabama Supreme Court merely presumed that the trial judge found that there was wrongful interference, "for otherwise he would not have ordered the writ of temporary injunction to issue" (21a). It escapes us how the appellate court in Montgomery could have presumed how the trial court in Mobile viewed Neira's testimony in the absence of findings by the trial court.

Neira's testimony from the witness stand cannot, of course, change the purpose of the picketing as set forth on the picket signs and in the leaflets distributed by the mute pickets. Moreover, the purpose of the picketing was clearly set forth in the instructions which Neira received from the Committee of American Maritime Unions (113a, 114a). It is to be noted that the final numbered instruction advised that no one had authority to change the instructions except upon a writing from the Committee's headquarters. Neira testified that he had no authority to change the instructions (141a, 142a). Manifestly, whatever hope Neira entertained *in pectore* on the picket line, and later articulated on the witness stand, could not in any event have changed the purpose or the character of the peaceful primary nonobstructive informational picketing at the site of the vessels. It is more than distressing that the freedom of speech of American workingmen can be snatched away on such a feeble ground.

In *Seafarers International Union* v. *N.L.R.B.*, 265 F. 2d 585, 592 (D.C. Cir. 1959), it was held that hopes entertained by primary pickets that employees of secondary employers would not cross the picket line could not render the picketing unlawful, and in *Local 761, International Union of Elec-*

trical, etc., v. *N.L.R.B.*, 366 U.S. 667 (1961), this Court quoted with approval those portions of the opinion in the *Seafarers* case concerning the hope of the pickets that the picket line would be honored and the holding that picketing which induced secondary employees to respect a primary picket line is not the equivalent of picketing which has as an object the inducing of employees to engage in concerted conduct against their own secondary employer in order to force him to refuse to deal with the primary employer (*id.* at 673). This Court there held that primary picketing at a common situs, appealing to neutral employees whose tasks aid the primary employer's everyday operations, is not unlawful. Accord: *United Steel Workers* v. *N.L.R.B.*, 376 U.S. 492, 501 (1964).

This Court has repeatedly admonished that freedom of speech may not be curtailed without clearly identifying the unlawful conduct which is sought to be prohibited. First and Fourteenth Amendment rights may not be taken away without clear and sufficient findings of fact; *Wood* v. *Georgia*, 370 U.S. 375, 382-384 (1962)—no findings; *Chase* v. *Robson*, 435 F. 2d 1059, 1061 (7 Cir. 1970)—insufficient findings; see also *Logan Valley Plaza*, 391 U.S. at 314. We do not rest our argument entirely on the lack of findings. It is clear that, in any event, there could have been no finding that the purpose of the picketing was unlawful.

By virtue of the injunction against peaceful primary informational picketing, plaintiffs have been deprived of their freedom of speech. This Court must restore it to them.

Conclusion

We submit that where American seamen are involved in a dispute with foreign flag vessels, protesting their loss of domestic employment opportunities, as at bar, their peaceful primary informational picketing can be regulated, if at all, only by the National Labor Relations Board. This Court has reiterated the doctrine of preemption. The Alabama courts have ignored the decisions of this Court.

Also ignored were decisions of this Court holding that peaceful picketing is within the protection of the First and Fourteenth Amendments, and that the right of free speech cannot be lost without specific findings of unlawful purpose or unlawful means. Here, the voices of American seamen were stilled in Alabama on the mere assumption of the Supreme Court of that state that the trial court must have found an unlawful purpose, otherwise it would not have issued the injunction. Such an assumption was surely not within the competence of an appellate court and was not, of course, warranted by anything in the record. The purpose of the picketing was clearly set forth on the picket signs, in the leaflets distributed by mute pickets and in the instructions from the Committee of American Maritime Unions. American seamen have lost the right of free speech because, said the Supreme Court of Alabama, their speech was effective or, at least, one union member hoped

that it would be effective. This Court must restore those First and Fourteenth Amendment freedoms to American seamen.

Respectfully submitted,

HOWARD SCHULMAN
DAVID JAFFE
Attorneys for Petitioners

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

OTTO E. SIMON
SIMON & WOOD
Mobile, Alabama

Certificate of Counsel

I, DAVID JAFFE, one of the attorneys for Petitioners herein, do hereby certify that on this 8th day of November, 1973, three copies of the foregoing petition for writ of certiorari have been served on each of the attorneys for Respondents as follows:

AMBRECHT, JACKSON & DEMOUY, Esqs.
P. O. Box 290
Mobile, Alabama 36601
Attorneys for Respondent,
Mobile Steamship Association, Inc.

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON, Esqs.
P. O. Box 23
Mobile, Alabama 36601
Attorneys for Respondent,
Robert E. Malone

by mailing the same to them through the United States Postal Service, postage prepaid.

/s/ DAVID JAFFE

DAVID JAFFE

[redacted]

TABLE OF CONTENTS

	PAGE
Chronological List of Relevant Docket Entries	Ia
Statute Involved	1a
Constitutional Provisions Involved	4a
Opinion of Supreme Court of Alabama	5a
Denial of Rehearing, Supreme Court of Alabama	27a
Order for Injunction	28a
Notice of Appeal	31a
Original Bill of Complaint	33a
Complaint of Intervention	42a
Demurrer	52a
Pleas	53a
Answer	55a
Assignment of Errors	57a
Minutes of Hearing, Circuit Court of Mobile County, Alabama	59a
Complainant's Evidence	
Affidavit of W. D. Walsh	61a
Affidavit of John T. Murray, Jr.	63a
Affidavit of E. Rob Leatherbury	65a
Affidavit of J. R. Macpherson	67a

Intervenor's Evidence

	PAGE
Affidavit of Mrs. J. C. Bohanon	77a
Affidavit of Robert C. Malone	79a

Respondents' Evidence

Stipulation	81a
Testimony of J. R. Macpherson, Direct	82a
Cross	88a
Exhibit B—Leaflet Distributed by Pickets	91a
Affidavit of Louis Neira	92a
Testimony of Louis Neira, Direct	106a
Exhibit E—Instructions to Pickets	113a
Cross (Complainant)	115a
Cross (Intervenor)	130a
Redirect	141a
Recross	142a
Direction of the Circuit Court of Mobile County, Alabama, on Granting Temporary Injunction	145a

Chronological List of Relevant Docket Entries

November 5, 1971 Original bill of complaint seeking temporary and permanent injunctive relief against picketing by respondent unions, filed in the Circuit Court of Mobile County, Alabama.

November 9, 1971 Petition of respondent unions for removal of the action filed in the United States District Court for the Southern District of Alabama.

November 10, 1971 United States District Court for the Southern District of Alabama granted motion of complainant to remand action to the Circuit Court of Mobile County, Alabama.

November 10, 1971 Complaint of intervention of complainant Robert E. Malone filed.

November 10, 1971 Demurrer, pleas and answer of respondent unions filed.

November 10-11, 1971 Trial before the Circuit Court of Mobile County, Alabama, on bills of complaint seeking a writ of temporary injunction against picketing by respondent unions.

November 11, 1971 Order overruling demurrer of respondent unions.

November 11, 1971 Order granting temporary injunction.

November 22, 1971 Notice of appeal by respondent unions to Supreme Court of Alabama filed in the Circuit Court of Mobile County, Alabama.

Chronological List of Revelant Docket Entries

February 18, 1972 Order of the Circuit Court of Mobile County, Alabama, granting respondent unions extension until February 21, 1972 to file transcript of the record in the Supreme Court of Alabama.*

February 23, 1972 Order of the Supreme Court of Alabama extending time of appellants to file transcript of the record until March 22, 1972.*

March 21, 1972 Order of the Supreme Court of Alabama extending time of appellants to file transcript of record to April 21, 1972.*

April 19, 1972 Order of the Supreme Court of Alabama extending time of appellants to file transcript of record to May 22, 1972.*

May 18, 1972 Order of the Supreme Court of Alabama extending time of appellants to file transcript of record to June 22, 1972.*

August 11, 1972 Order of the Supreme Court of Alabama extending time of appellants to file transcript of record to October 20, 1972.*

May 3, 1973 Affirmance by the Supreme Court of Alabama of the order granting temporary injunction.

July 5, 1973 Order of the Supreme Court of Alabama overruling appellants' application for rehearing.

* Entries included at request of Respondents.

APPENDIX A

Statute Involved

From National Labor Relations Act, 29 United States Code:

§157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140.

§158. Unfair Labor Practices

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in

commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

• • •

APPENDIX B

Constitutional Provisions Involved

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

Opinion of Supreme Court of Alabama May 3, 1973

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1972-73

AMERICAN RADIO ASSOCIATION, AFL-CIO, etc., et al.

v. SC 12

MOBILE STEAMSHIP ASSOCIATION, INC., et al.

Appeal from Mobile Circuit Court, In Equity

McCALL, JUSTICE.

The American Radio Association, AFL-CIO, an unincorporated labor organization, and other respondents in this cause, hereafter sometimes called the "Unions," appeal from an order of the circuit court, granting, after notice and a court hearing, a writ of temporary injunction, enjoining and restraining the appellants from picketing.

The appellee Mobile Steamship Association, Inc. is the representative and agent of numerous steamship and contract stevedoring companies who do business at the Port of

Appendix C

Mobile. The appellee acts as collective bargaining representative and contract negotiator on behalf of its several principals in their business relations with local unions of the International Longshoremen's Association, who supply the stevedoring services for the loading and discharging of cargo carried by numerous ships calling at the Port of Mobile.

The appellee, Robert E. Malone, who was allowed to intervene in the cause, is a farmer in Mobile County. He grows soybeans which are delivered in sale by him at the grain elevator at the Alabama State Docks. Soybeans are exported by ship through the State Docks facility.

Shortly after noon on November 3, 1971, pickets for several of the appellant unions appeared at land entrances to the Alabama State Docks at Mobile, picketing and patrolling with uniform signs reading as follows:

"'ATTENTION TO THE PUBLIC

"'The wages and benefits paid aboard the vessel SS Aqua Glory and the SS Bel Hudson are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.

"'Please do not patronize these vessels. Help the American seamen.

"'We have no dispute with other vessels at this site.'"

The names of the picketing unions appeared beneath the quoted matter.

Appendix C

In addition to carrying the picketing signs, the pickets distributed to those persons, who asked if they should cross the picket line, leaflets which read as follows:

"TO THE PUBLIC

"American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute here is limited to the vessel picket at this site, the SS ".

The names of the unions again appeared at the bottom of the leaflets.

Two days later the pickets shifted to pier side, where the S.S. Aqua Glory and S.S. Bel Hudson were berthed. Soon afterwards the pickets were withdrawn from the Bel Hudson, a ship of British registry.

Appendix C

The Aqua Glory was a foreign-flag ship of Liberian registry, engaged in carrying cargo in foreign commerce, and manned by a crew of alien seamen. No more than four persons engaged in the picketing along pier side at the gangway to the Aqua Glory. No breach of contract was involved. The picketing was peaceful and without any violence. There was no mass picketing, no trespassing on the property of others, no blocking of ingress or egress, no shouting, no assaults, and no overt acts of force. The pickets, while on duty carried their signs, but refused to converse with other individuals. They remained silent and only referred inquisitors to their picketing signs and handed them one of the above described leaflets. The appellant unions asserted that they purposed to picket all foreign-flag ships that docked at the port in order to evidence a nationwide protest by American Maritime Workers over the loss of their jobs to foreign-flag vessels which paid wages and benefits substandard in contrast to those paid on American-flag vessels. The appellants insisted that they would attack the problem of the loss of job opportunities for American seamen in the United States to foreign-flag vessels by publicity or informational picketing and the distribution of literature in selected American ports, including the Port of Mobile, requesting the public not to patronize foreign-flag vessels which were picketed, but to patronize American-flag vessels, pointing out to the public that wages and benefits paid to foreign-flag seamen were vastly inferior to those paid American seamen.

Posting the pickets, as was done on the dock adjacent to the Aqua Glory, brought about an immediate refusal

Appendix C

by the stevedore workers of the locals of International Longshoremen's Association to cross the picket line of the appellant unions. About eighty percent of the cargo ships that enter the Port of Mobile, sail under a foreign-flag and are manned by alien crews.

The appellees complained that the picketing was illegal because it interfered with contractual relations between members of the appellee association and companies owning and operating foreign-flag vessels, and, wrongfully interfered with lawful business of the appellees.

There was no dispute between the operators of the Aqua Glory and her foreign crew. But there was a labor dispute between the American unions and the operators of the Aqua Glory. This was brought about by substandard wages and benefits, resulting in loss of jobs by American seamen. The American unions contend that they are seeking relief from this situation. A labor dispute includes any controversy concerning terms, tenure or conditions of employment, regardless of whether the disputants stand in the proximate relation of employee and employer. 29 U. S. C., §152(9).

The threshold point for determination is, granting there is a labor dispute between the unions and the foreign companies, is it a "labor dispute" of such nature that the Labor Management Relations Act, 29 U. S. C., §141 et seq., preempts the jurisdiction of the state courts of Alabama?

The appellants contend that the jurisdiction of the state court is preempted by the Labor Management Rela-

tions Act, 29 U. S. C., §141 et seq. and that exclusive jurisdiction of the case is reserved to the National Labor Relations Board. In opposition the appellees assert that the jurisdictional provisions of the National Labor Relations Act, 29 U. S. C., §151 et seq. as amended by the Labor Management Relations Act, 1947, 29 U. S. C. §141 et seq. do not extend to maritime operations of foreign-flag ships employing alien seamen. 48 Am. Jur. 2d, §405, p. 296. If the appellees' insistence be a correct statement of law, then, under the facts in this case, the state court did not lack jurisdiction to entertain this suit in equity as urged by the appellants.

As already pointed out, there is a labor dispute here between the unions and foreign ship companies over terms, tenure and conditions of employment by them of their foreign crews. The picketing of the foreign ship has the effect to both publicize the unions' grievance against substandard wages as well as to bring pressure on the foreign employer to pay its seamen higher wages and provide them additional benefits. This purpose is borne out by the language of the placards and leaflets. The Supreme Court of the United States has refused to apply the provisions of the National Labor Relations Act in instances concerning the internal affairs of foreign ships even when in American ports and arguably affecting the American economy. Congress has not clearly extended NLRB jurisdiction to such matters and the court has been unwilling to find board jurisdiction in an area where international relations are involved. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963).

In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* supra, United Fruit Company, a New Jersey corporation, owned all of the stock of Empresa Hondurena de Vapores, S.A., a Honduran corporation, which legally owned each of the vessels, sought to be unionized. Each vessel flew a foreign flag, carried a foreign crew and had other contacts with the nation of its flag. The National Labor Relations Board ordered an election in a representation proceeding on application of the National Maritime Union, which had the effect of canceling the bargaining contract that Empresa's seamen had with their Honduran Union, Sociedad. Sociedad brought one of the suits involved on appeal to prevent the election.

The court said that the basic question was whether the NLRA as written was intended to have any application to foreign registered vessels employing only alien seamen. After noting that the Congress and the State Department had recognized the right of foreign ships to conduct their own internal affairs, the court concluded, citing *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 at 147, 1 L. Ed. 2d 709, 77 S. Ct. 699, that "to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'"

Explaining further its rationale, the court at p. 18 in *McCulloch,* supra, said:

"Six years ago this Court considered the question of the Taft-Hartley amendments to the Act in a suit for damages 'resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel [was] temporarily in an American port.' Benz v. Compania Naviera Hidalgo, supra, at 139. We held that the Act did not apply, searching the language and the legislative history and concluding that the latter 'inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.' Id., at 144. Subsequently, in Marine Cooks & Stewards v. Panama S.S. Co., 362 U. S. 365 (1960), we held that the Norris LaGuardia Act, 29 U. S. C. §101, deprived a Federal District Court of jurisdiction to enjoin picketing of a foreign-flag ship, specifically limiting the holding to the jurisdiction of the court 'to issue the injunction it did under the circumstances shown.' Id., at 372. That case cannot be regarded as limiting the earlier Benz holding, however, since no question as to 'whether the picketing * * * was tortious under state or federal law' was either presented or decided. Ibid. Indeed, the Court specifically noted that the application of the Norris-LaGuardia Act 'to curtail and regulate the jurisdiction of courts' differs from the application of the Taft-Hartley Act 'to regulate the conduct of people engaged in labor disputes.' Ibid.; see Comment, 69 Yale L. J. 498, 523-525 (1960)."

Again in *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U. S. 24, 9 L. Ed. 2d 557, 83 S. Ct. 611 (1963), the facts involved an American seamen's union picketing a foreign owned vessel, manned by a foreign crew, in a campaign to organize the crew. The court held that the NLRB was without jurisdiction, saying:

"We held today in Sociedad Nacional that the Act does not apply to foreign-registered ships employing alien seamen. The holding and reasoning in that case are equally applicable to the maritime operations here, leading to the conclusion that the Act does not apply. It is true that our decision in Garmon [359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)], supra, as applied in Marine Engineers Beneficial Assn. v. Interlake S.S. Co., 370 U. S. 173 (1962), results in pre-emption of state court jurisdiction if a dispute is arguably within the jurisdiction of the Board. But, although it was arguable that the Board's jurisdiction extended to this dispute at the time of the New York Court of Appeals' decision, our decision in Sociedad Nacional clearly negates such jurisdiction now. In that case we were immediately concerned with the Board's jurisdiction to direct an election, holding that the Act had no application to the operations of foreign-flag ships employing alien crews. Therefore, no different result as to Board jurisdiction follows from the fact that our immediate concern here is the picketing of a foreign-flag ship by an American union. See Benz v. Compania Naviera Hidalgo, 353 U. S. 138 (1957). The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of §2(6), 29 U. S. C. §152(6)."

Applying the rationale of the above decisions of the Supreme Court of the United States to the facts of the case at hand, we conclude that the Labor Management Relations Act of 1947 does not apply in this case and did not preempt the state court from entertaining juris-

diction of the cause. The dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of those vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case are matters affecting international relations and not properly for NLRB jurisdiction.

We disagree with the appellants' contention that the state court may not grant injunctive relief because the Norris-LaGuardia Act, 29 U. S. C. §§101, et seq., prohibits the issuance of any restraining order or temporary or permanent injunction by a state court in a peaceful labor dispute.

The Norris-LaGuardia Act, 29 U. S. C. §§101, et seq., provides as follows:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

29 U. S. C., §113(d) defines the term "court of the United States" as follows:

> "(d) the term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

The anti-injunction provisions of the Norris-LaGuardia Act are not applicable to state courts and hence, do not deprive them of jurisdiction to issue an injunction in a case involving a labor dispute.

In *Ford* v. *Boeger,* 362 F. 2d 999 (1966); certiorari denied sub nom *Curtis* v. *Boeger,* 386 U. S. 914, 17 L. Ed. 2d 787, 87 S. Ct. 857; petition for rehearing denied 386 U. S. 978, 18 L. Ed. 2d 140, 87 S. Ct. 1160; motion for leave to file second petition for rehearing denied 387 U. S. 949, 18 L. Ed. 2d 1341, 87 S. Ct. 2072, the court said:

> "Petitioners' reliance upon the Norris-LaGuardia anti-injunction Act, 29 U. S. C. A. §101 et seq., is misplaced. The Norris-LaGuardia injunction limitations are imposed only upon courts of the United States. The Court of Appeals for the Third Circuit in American Dredging Co. v. Local 25, etc., 3 Cir., 338 F. 2d 837, 850-856, clearly and convincingly demonstrates why prohibition applies only to federal courts—not to state courts."

In the cited case of *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Eng'rs,* 338 F. 2d 837, 852 (3d Cir. 1964), certiorari denied 380 U. S. 935, 13 L. Ed. 2d 822, 85 S. Ct. 941 (1965), the court stated:

> "There is nothing in the language of the Act or its legislative history which can possibly, within 'the range of judicial inventiveness', or the process of judicial fashioning, be construed as extending to the jurisdiction of state courts."

Among other cases holding without merit the contention that the Norris-LaGuardia Act deprived the court

below of jurisdiction to issue the injunction in this labor dispute are the following decisions of state courts: *Shaw Electric Co., Inc.* v. *International Brotherhood Electrical Workers, Local Union 98,* 418 Pa. 1, 208 A. 2d 769 (1965); *South Atlantic and Gulf Coast District, International Longshoremen's Ass'n* v. *Producers Grain Corporation,* 437 S. W. 2d 33 (Tex. Civ. App. 1969).

We are aware that there is considerable difference of thought on the legality of state court injunctions in matters involving labor disputes. To this we can only say that generally where there is a clearly defined labor dispute affecting commerce the NLRB has jurisdiction preemptive of all courts state and federal. But, as here, where the dispute is one where commerce, as covered by the federal act, is not involved, and the resulting effect, albeit non-direct, of the dispute immediately endangers the business activities of a large segment of the area's population, we think that it is neither illegal nor improper for the court to take jurisdiction and deal temporarily with the subject matter.

The second tier of the dispute on appeal involves the propriety of the issuance of the temporary injunction. Specifically, even though there was no NLRB preemption, was the activity involved protected by the First Amendment as free expression; or was it such unlawful interference with the business of another as will be enjoined under our state laws?

The appellant unions contend that their activity is protected as free speech under the United States Constitu-

tion as construed in *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, and its progeny. We are mindful however of the characterization of similar matters as "speech plus," that is, speech with collateral consequences involved that invite regulation, or, as matters excepted from First Amendment protection because of overriding state interest. The First and Fourteenth Amendments do not afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets as those amendments afford to those who communicate by pure speech.

The case of *International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166 (1957) has approached resolving the issue in the labor forum. In *Vogt,* a union, having a dispute with a group of nonunion workers, picketed the employer's place of business. In consequence, truckers of other employers refused to haul to and from Vogt's business. The neutral employer sought and obtained a state court injunction. The court noted the historical development of the theory that labor picketing is protected free speech, beginning in the *Thornhill* case, supra, and furthered in *AF of L* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568 (1941). After analyzing these decisions, the *Vogt* case, supra, went on to admit that the reach of those opinions had perhaps exceeded practicality, and discussed three subsequent Supreme Court cases which strongly parallel the present dispute. In *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 497, 93 L. Ed. 834, 69 S. Ct. 684 (1949), the court said:

"It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgement of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. • • • But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities • • • constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. • • • "

In *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950), and in *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 975, 70 S. Ct. 773 (1950), state court injunctions against picketing were upheld on a showing that the courts were effecting a valid state interest or public policy. In *Hughes,* the policy was against racial quota hiring and in *Hanke* the policy was the avoidance of forced union shop agreements. The court in *Vogt* held that, while states cannot enact blanket prohibitions against picketing, where there are conflicting interests between the picketers and the public policy of a state, the picketing can be enjoined, and allowed the state court injunction against picketing to stand.

In the instant case as will be shown infra, we think there was evidence sufficient to support a finding that the

action of the unions was in part with the goal of interfering with the business of the appellees in their shipping and farming operations. The United States Court of Appeals for the First Circuit has recently noted that there is a valid state interest in the preservation of local economy.

In *Grinnell Corp.* v. *Hackett,* 41 U. S. L. W. 2533 (CA 1st Cir., March 15, 1973) which admittedly did not involve a picketing injunction, the court recognized two economic and social effects which are valid interests of the state and may be considered in labor disputes. The first of the two effects, the avoidance of violence in strikes is not here present, but the second recognized effect of a labor dispute is. The court noted that a state may be validly concerned with the "avoidance of economic stagnation in the local community" caused by strike activity.

We feel the Circuit Court in Mobile County could validly consider the economic effects of the picketing at the particular time the dispute was in progress and issue its order ceasing all picketing until the underlying questions could be resolved without unlawfully interfering with appellants' rights to express themselves on the disputed issue.

While peaceful picketing, standing alone, is conceded to be lawful and is not to be enjoined, picketing still may be enjoined if it is done in an unlawful manner or for an unlawful purpose. *Local No. 612, International Brotherhood of Teamsters* v. *Bowman Transportation, Inc.,* 276 Ala. 563, 165 So. 2d 113 (1964); *Bagett Transportation Co.* v. *Local No. 261, United Wholesale & Warehouse Employees Union,* 259 Ala. 19, 65 So. 2d 506 (1953); *Hotel & Restaurant Em-*

ployees, International Alliance v. *Greenwood,* 249 Ala. 265, 30 So. 2d 696 (1947); *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). The conduct of picketing, if done in an unlawful manner or for an unlawful purpose, is not beyond the control of a state. *Baggett Transportation Co.* v. *Local No. 261, United Wholesale and Warehouse Employees Union,* supra; *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950). If the purpose or object for the picketing, or any of the purposes or objects therefor, is interference with the right of a third party to conduct his business, the picketing is wrongful and may be enjoined. *International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166 (1957).

In *Pennington* v. *Birmingham Baseball Club,* 277 Ala. 336, 170 So. 2d 410 (1964), the court said:

> "* * * [T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected if necessary, by injunctive process. Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383, 144 A. L. R. 1177."

So the bare question in this case narrows to whether or not there was a purpose or objective on the appellants' part to wrongfully interfere with the appellees' business, or was the picketing to publicize the appellants' cause with mere resulting incidental interference to appellees' business? The trial judge's decree, granting the writ of temporary injunction, made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the ap-

pellants with the appellees' business, for otherwise, he would not have ordered the writ of temporary injunction to issue.

The appellants contend that their only purpose was to carry out publicity picketing to inform the public and Congress of the plight of the American seamen. The appellee contends that the picketing was done for the purpose of inducing and encouraging the appellee's employees to cease loading the soybeans aboard foreign ships thereby interfering with the business of its member employers.

We must decide whether the trial judge abused his discretion by concluding that there was wrongful interference with the appellee's business, warranting his issuance of the temporary writ. In this situation some well known equitable principles should be kept in mind. Among these, it is to be remembered that, in determining whether or not a temporary injunction should have issued, wide discretion is accorded the trial judge hearing the application and making the decision, and, where no abuse of that discretion is shown, his action will not be disturbed on appeal. *Slay* v. *Hess,* 252 Ala. 455, 41 So. 2d 582 (1949); *Jones* v. *Jefferson County,* 203 Ala. 137, 82 So. 167 (1919); *Holcomb* v. *Forsyth,* 216 Ala. 486, 113 So. 516 (1927); *Boatwright* v. *Town of Leighton,* 231 Ala. 607, 166 So. 418 (1936).

In *Madison Limestone Co.* v. *McDonald,* 264 Ala. 295, 300, 87 So. 2d 539 (1956), we said this:

> "* * * When the bill contains equity, the trial judge, in granting a temporary injunction to pre-

serve the status quo until the final hearing, exercises a wide discretion, taking into consideration the relative advantages and disadvantages resulting from granting or refusing to grant the injunction. Unless that discretion is abused it will not be disturbed on appeal. Slay v. Hess, supra; Loop National Bank v. Cox, [255 Ala. 388, 51 So. 2d 534] supra."

And, a sequel to the theories of balancing conveniences between the parties and the discretionary power of the trial judge to maintain the status quo until the final hearing, is the premise that the issue of who will prevail on final hearing is not concluded on a preliminary hearing to determine whether an injunction pendente lite will issue or not. In *Hamilton* v. *City of Anniston,* 248 Ala. 396, 401, 27 So. 2d 857 (1946), the court said:

"* * * The right to temporary injunction does not depend on any advance finding for complainant on the merits. Odoms v. Woodall, 246 Ala. 427, 20 So. 2d 849; Berman v. Wreck-A-Pair Bldg. Co., 234 Ala. 293, 175 So. 269. It is not necessary that complainant must present a case which will certainly entitle him to a decree upon a final hearing for he may be entitled to temporary injunction though his right to relief may ultimately fail. If the bill clearly shows a substantial question to be decided, a temporary injunction to preserve the status quo is in order. Glass v. Prudential Ins. Co. of America, 246 Ala. 579, 22 So. 2d 13; Coxe v. Huntsville Gaslight Co., 129 Ala. 496, 29 So. 867." See also *East Gadsden Bank* v. *Bagwell,* 273 Ala. 441, 445, 143 So. 2d 438.

We have no reason to assume otherwise than that the trial judge, in the exercise of the wide discretion accorded him in a matter of this kind, gave close heed to the issues involved, and concluded that while a substantial question remained to be decided, the immediate circumstances obliged him to order the temporary writ. Even so, we must consider the record to determine whether the trial judge abused his discretion in granting the temporary injunction. This necessitates our deciding whether or not there was any evidence to support a conclusion that the picketing had as a purpose or object the wrongful interference with the appellee's business.

During the course of the cross-examination of a witness for appellant unions, the following question and answer colloquy occurred:

"Q. What percentage of the vessels that call here at the Port [of Mobile] are of foreign flags? A. I would say about 70 to 80 percent.

"Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile? A. Within my resources, yes, to picket every one.

"Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines? A. We were hoping that they wouldn't do that.

"Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true? A. Well, to a point, yes.

"Q. *Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or from unloading cargo?* A. *My hope is to clutter up the Port of Mobile with foreign flags—Liberian, Panamanian ships—to bring sufficient pressure on the United States Government to do something about the American merchant marine.*

"Q. *That's your intention?* A. *Yes, sir.*

"Q. *That's your purpose?* A. *Yes, sir.*" (Emphasis supplied)

* * *

"Q. All right, sir. But you realize that your picketing is keeping members of the Mobile Steamship Association from loading and unloading these vessels that you are picketing, do you not? A. That is not the purpose of our picket line.

"Q. No, sir, I didn't ask you the purpose. You realize today that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing? A. *I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association.*" (Emphasis supplied)

In 51A C. J. S. Labor Relations, §319, p. 135, we find a statement of law that is material in a decision of this matter. It reads as follows:

> "*Expectation, hope or desire.* While it has been said that Congress did not intend to proscribe all actions accompanied merely by hope that such activity would affect the business relations between

> the primary and neutral employees, if picketing is conducted by a primary union with an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take concerted action, so that the secondary employer will cease doing business with the primary employer, the act bars such activity."

The Fifth Circuit Court of Appeals stated in *Superior Derrick Corporation* v. *National Labor Relations Board*, 273 F. 2d 891, 897 (5th Cir. 1960):

> "* * * [I]f there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take concerted action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity. * * * The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure on secondary employees on that secondary employer * * *"

If a purpose or an objective of the picketing was to crowd the Port of Mobile with foreign ships calling there to load and unload cargo, in order to bring pressure on the federal government to do something about the American merchant marine, or, if the picketing was being carried on with the hope or expectation or desire to shut down the whole State Docks, not just the appellant, Mobile

Appendix C

Steamship Company, so no one could work, then we think a substantial question would arise as to whether or not another intended purpose of the picketing was interference with appellee's business, which was the loading and unloading of ships. This situation called on the trial judge to exercise his discretion as to whether or not to grant a temporary injunction to maintain the status quo until a full hearing could be had before the court on the merits of the case. In his decision, he did not, in our opinion, abuse his discretion. We find no error in the trial judge's granting the writ of temporary injunction.

The appellants also assign as error the court's overruling their demurrer to the bill of complaint. Essentially the grounds of demurrer raise the same propositions of law to which we have written in this opinion. We see no need of speaking further to these legal issues.

The decree of the court entered by the trial judge in this cause is due to be affirmed.

AFFIRMED.

Coleman, Bloodworth, Faulkner, and Jones, JJ., concur.

I, J. O. SENTELL, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 3 day of May 1973.

J. O. SENTELL
Clerk, Supreme Court of Alabama

APPENDIX D

Denial of Rehearing

OFFICE OF

CLERK OF THE SUPREME COURT

STATE OF ALABAMA

Montgomery

Re: SC 12

AMERICAN RADIO ASSOC., *et al.*
Appellant

vs.

MOBILE STEAMSHIP ASSOC., INC., *et al.*
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

J. O. SENTELL
Clerk, Supreme Court of Alabama

July 5, 1973

APPENDIX E

Order for Injunction

IN THE

CIRCUIT COURT OF MOBILE COUNTY

ALABAMA, IN EQUITY

MOBILE STEAMSHIP ASSOCIATION, INC., a nonprofit corporation,

Complainant,

and

ROBERT C. MALONE,

Intervening Complainant,

vs.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

MOBILE STEAMSHIP ASSOCIATION, INC., a nonprofit corporation, Complainant in the above entitled cause, and ROBERT C. MALONE, Intervening Complainant, having presented to the undersigned as one of the Judges of the Circuit Court of Mobile County, Alabama, their sworn Bills of Complaint praying for a temporary writ of injunction against the Respondents in the above entitled cause; and the Court after holding a hearing in open court and having considered the matter, and affidavits and oral testimony

and being of the opinion, and finding that said temporary injunction should be issued as prayed for in said Complaint;

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that, upon the Complainants giving bond, with good and sufficient surety, in the amount of $5000.00 Dollars, to be approved by the Register, conditioned to pay all damages and costs which any of the Respondents may sustain by the suing out of such an injunction, if the same is dissolved, a temporary injunction shall issue enjoining and restraining American Radio Association, AFL-CIO; International Organization of Masters, Mates and Pilots, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; National Maritime Union of America, AFL-CIO; Radio Officers Union of the United Telegraph Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; Price L. Mitchell; Charles D. Malloy; Layton Overstreet; Louis F. Neira; AB; CD; EF; GH; IJ; KL; MN; OP; QR; ST; UV; WX; YZ; and their respective servants, agents, pickets, officers, employees, members and representatives, separately and severally, and those in active concert and participation with them, separately and severally, and all other persons, from:

1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant Mobile Steamship Association, Inc.

2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or

Appendix E

desiring to work for members of Complainant Mobile Steamship Association, Inc.

3. Interfering with the operations of any member of Complainant Mobile Steamship Association, Inc. in any manner whatsoever.

4. Picketing or interfering at or near Complainant Mobile Steamship Association, Inc. and its members' premises or premises used by Complainant Mobile Steamship Association's members in a manner calculated to intimidate Complainant Mobile Steamship Association's members' employees or anyone working in association with the Complainant Mobile Steamship Association's members, or any other person entering or leaving or attempting to enter or leave Mobile Steamship Association's members' premises, or calculated to induce any such persons not to report or apply for work at Mobile Steamship Association's members' premises, or any facility used by Mobile Steamship Association's members.

5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

6. Interfering with the contractual relations existing or to exist between the members of the Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile.

Done this 11th day of November, 1971.

William D. Bolling
Circuit Judge

APPENDIX F

Notice of Appeal

IN THE

CIRCUIT COURT OF MOBILE COUNTY

Alabama, in Equity

[Same Title]

Come now American Radio Association, AFL-CIO, International Organization of Masters, Mates and Pilots, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; National Maritime Union of America, AFL-CIO; Radio Officers Union of the United Telegraph Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; Price L. Mitchell; Charles D. Malloy; Layton Overstreet; Louis F. Neira; AB, CD, EF, GH, IJ, KL, MN, OP, QR, ST, UV, WX and YZ, whose names will be supplied when ascertained; and the respective agents, officers, servants, employees, pickets and members and representatives, separately and severally, of each of them, and those in active concert and participation with them, separately and severally, Respondents in the above entitled cause and hereby give notice of appeal from the Order of the Circuit Court of Mobile County, Alabama, in Equity, entered on the 11th day of November, 1971, grant-

ing a temporary injunction enjoining and restraining the Respondents from picketing.

SIMON AND WOOD

By: Otto E. Simon

Otto E. Simon

MOORE, MOORE, DOWNING & LAYDEN

By: Lionel L. Layden

Lionel L. Layden

SCHULMAN, ABARBANEL, MCEVOY & PERKEL

By: Bertram Perkel

Bertram Perkel

Attorneys for Respondents

APPENDIX G

Original Bill of Complaint

IN THE

CIRCUIT COURT OF MOBILE COUNTY

ALABAMA, IN EQUITY

No. 81679-B

MOBILE STEAMSHIP ASSOCIATION, INC.,
Complainant,

vs.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

To the Honorable Judges of the Circuit Court of Mobile County, Alabama, Sitting in Equity:

Complainant respectfully shows unto the Court as follows:

1. Complainant Mobile Steamship Association, Inc. is a nonprofit corporation organized and existing under the laws of the State of Alabama with its principal place of business in Mobile, Alabama.

2. Respondent American Radio Association, AFL-CIO, hereinafter sometimes called "ARA", is an unincorporated

labor organization doing business in the city and county of Mobile, State of Alabama.

3. Respondent International Organization of Masters, Mates and Pilots, AFL-CIO, hereinafter sometimes called "MM & P", is an incorporated labor organization doing business in the city and county of Mobile, State of Alabama.

4. Respondent National Marine Engineers Beneficial Association, AFL-CIO, hereinafter sometimes called "MEBA", is an incorporated labor organization doing business in the city and county of Mobile, State of Alabama.

5. Respondent National Maritime Union of America, AFL-CIO, hereinafter sometimes called "NMU", is an unincorporated labor organization doing business in the city and county of Mobile, State of Alabama.

6. Respondent Radio Officers Union of the United Telegraph Workers, AFL-CIO, hereinafter sometimes called "ROU", is an unincorporated labor organization doing business in the city and county of Mobile, State of Alabama.

7. Respondent Seafarers International Union of North America, AFL-CIO, hereinafter sometimes called "SIU", is an unincorporated labor organization doing business in the city and county of Mobile, State of Alabama.

8. Respondent Price L. Mitchell is a member and authorized agent of Respondent MM & P.

9. Respondent Charles D. Malloy is a member and authorized agent of Respondent MEBA.

10. Respondent Layton Overstreet is a member and authorized agent of Respondent NMU.

11. Respondent Louis F. Neirn is a member and authorized agent of Respondent SIU.

12. Respondents AB, CD, EF, GH, IJ, KL, MN, OP, QR, ST, UV, WX and YZ, whose names are otherwise unknown to Complainant but whose names will be supplied when ascertained, are all over the age of 21 years, or residents of Mobile County, Alabama, and are agent, members and/or pickets of one or more of the Respondent Unions designated above.

13. Complainant is and for many years has been the duly designated collective bargaining representative for and has acted on behalf of steamship companies and contract stevedores in Mobile, Alabama and as such collective bargaining agent has entered into and fulfilled collective bargaining agreements with local unions of the International Longshoremen's Association.

14. There are at the present time in the Port Of Mobile foreign flag ships awaiting loading and/or discharge by members of the Mobile Steamship Association, Inc., and in the coming weeks, additional foreign flag vessels are expected to arrive at the Port of Mobile for loading

and/or discharge by members of the Mobile Steamship Association, Inc.

15. On or about 12:10 P.M. on November 3, 1971, several persons, acting under the authorization and direction of Respondents and carrying picket signs, began picketing and patrolling the east and main gate of the Alabama State Docks Department. The picket signs carried by these individuals read substantially as follows:

"ATTENTION TO THE PUBLIC

The wages and benefits paid aboard the vessel SS AQUA GLORY and the SS BEL HUDSON are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.

Please do not patronize these vessels. Help the American seamen."

16. The individual pickets referred to above have distributed leaflets, a true and correct copy of which is attached hereto as "Exhibit A".

17. Notwithstanding a Federal Court order to return to work, employees of members of Complainant represented by locals of the International Longshoremen's Association have refused to cross said picket line and return to work, notwithstanding efforts by members of the Mobile Steamship Association to obtain such employees for the loading and/or discharge of the aforesaid vessels.

18. The picketing by Respondents commenced without prior warning and Respondents plan and intend to direct such picketing against the SS AQUA GLORY and SS BEL HUDSON and other vessels in similar situations to be loaded and/or unloaded by members of the Mobile Steamship Association, Inc.

19. Respondents have also directed employees of other employers and represented by Respondents to refuse to provide any work or service with respect to such vessels.

20. Respondents' picketing and other interference directed at the SS AQUA GLORY and the BEL HUDSON and the threat of such picketing and interference directed at other such vessels constitute an unlawful interference with the contractual relations existing between the members of the Mobile Steamship Association, Inc. and the companies that own and operate the aforementioned vessels.

21. Respondents' picketing and other interference directed at the SS AQUA GLORY and the SS BEL HUDSON and the threat of such picketing and interference directed at other such vessels constitute an unlawful interference with the rights of the Mobile Steamship Association, Inc. and its members to carry on their lawful businesses.

22. Complainant, Mobile Steamship Association, Inc., and its members, are suffering irreparable harm and grievous injury resulting from the picketing and other acts of interference directed at the SS AQUA GLORY and the SS BEL HUDSON and is threatened with further irreparable

injury through similar acts and conduct by Respondents directed at other such vessels, in that their reputation, goodwill and business, including their reputation for dependability, are being injured by Respondents' actions which have impaired and threaten further to impair their ability to enter into profitable arrangements with others; in that their contractual obligations to others are wrongfully impaired and that their relationship with their customers are being impaired; in that member companies of the Mobile Steamship Association are losing in excess of $15,000.00 per day in fixed overhead costs, including, but not limited to, offices, office and supervisory staff, and depreciation of equipment; in that soybeans normally shipped through the Port of Mobile on vessels such as the SS AQUA GLORY and the SS BEL HUDSON are being delayed and unless commenced within the immediate future will cause a loss in excess of $50,000,000.00 to the agricultural interests in this area.

23. Complainant has no adequate remedy at law for Respondents' acts set forth hereinabove, and unless the Respondents and each of them are restrained as hereinafter prayed, Complainant and this community will suffer irreparable damage. Monetary damages in part cannot be calculated.

24. If the picketing and interference by Respondents as hereinabove specified has as its purpose the matters as set forth in the literature being distributed by said pickets and on said picket signs, which Complainant denies, Com-

plainant avers that the interest of Respondents is greatly outweighed by the irreparable harm and damage that will be sustained by Complainant, its members, the Community, and members of the community, if said picketing is allowed to continue.

Prayer for Process

Wherefore, Complainant prays that said Respondents and the respective servants, agents, officers, employees, pickets, members and representatives, separately and severally, of each of said Respondents, separately and severally, be made parties hereto, and be required to plead, answer or demur hereto, within the time allowed by law.

Prayer for Relief

Complainant prays that this Honorable Court will immediately issue a temporary writ of injunction restraining and enjoining Respondents and the respective agents, officers, servants, employees, pickets and members and representatives, separately and severally, of each of them, and those in active concert and participation with them, separately and severally, from:

1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant.

2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for members of Complainant.

Appendix G

3. Interfering with the operations of any member of Complainant in any manner whatsoever.

4. Picketing or interfering at or near Complainant and its members' premises or premises used by Complainant's members in a manner calculated to intimidate Complainant's members' employees or anyone working in association with the Complainant's members, or any other person entering or leaving or attempting to enter or leave Complainant's members' premises, or calculated to induce any such persons not to report or apply for work at Complainant's members' premises, or any facility used by Complainant's members.

5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

6. Interfering with the contractual relations existing or to exist between the members of the Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile.

And upon hearing of this cause this Honorable Court make the temporary injunction permanent.

Complainant further prays that the said injunction be in force and binding upon all the Respondents above named and all other persons whosoever, even though not named herein, where such person has knowledge of such injunction or when such injunction and existence thereof be made known to any such person by personal service upon him or any of them of a copy of same.

Appendix G

Complainant further prays that Complainant be allowed to recover from Respondents' damages and cost of suit herein incurred and be given such other, further and different relief as may be just and proper.

MOBILE STEAMSHIP ASSOCIATION, INC.

By J. R. Macpherson

As its President

ARMBRECHT, JACKSON & DEMOUY
Solicitors for Complainant
Post Office Box 290
Mobile, Alabama 36601

By Frank B. McRight

By Kirk C. Shaw

APPENDIX H

Complaint of Intervention

IN THE

CIRCUIT COURT OF MOBILE COUNTY

ALABAMA, IN EQUITY

No. 81,679-B

ROBERT E. MALONE,

Complainant,

vs.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

To the Honorable Judges of the Circuit Court of Mobile County, Alabama, Sitting in Equity:

Complainant respectfully shows unto the Court as follows:

1. Complainant is a citizen and resident of Mobile County, Alabama, over the age of 21 years, and is a farmer engaged in growing soy beans in Wilmer, Mobile County, Alabama.

2. Respondent American Radio Association, AFL-CIO, hereinafter sometimes called "ARA", is an unincorporated

Appendix H

labor organization doing business in the City and County of Mobile, State of Alabama.

3. Respondent International Organization of Masters, Mates and Pilots, AFL-CIO, hereinafter sometimes called "MM & P", is an incorporated labor organization doing business in the City and County of Mobile, State of Alabama.

4. Respondent National Marine Engineers Beneficial Association, AFL-CIO, hereinafter sometimes called "MEBA", is an incorporated labor organization doing business in the City and County of Mobile, State of Alabama.

5. Respondent National Maritime Union of America, AFL-CIO, hereinafter sometimes called "NMU", is an unincorporated labor organization doing business in the City and County of Mobile, State of Alabama.

6. Respondent Radio Officers Union of the United Telegraph Workers, AFL-CIO, hereinafter sometimes called "ROU", is an unincorporated labor organization doing business in the City and County of Mobile, State of Alabama.

7. Respondent Seafarers International Union of North America, AFL-CIO, hereinafter sometimes called "SIU", is an unincorporated labor organization doing business in the City and County of Mobile, State of Alabama.

8. Respondent Price L. Mitchell is a member and authorized agent of respondent MM & P.

9. Respondent Charles D. Malloy is a member and authorized agent of respondent MEBA.

10. Respondent Layton Overstreet is a member and authorized agent of respondent NMU.

11. Respondent Louis F. Neira is a member and authorized agent of respondent SIU.

12. Respondents AB, CD, EF, GH, IJ, KL, MN, OP, QR, ST, UV, WX and YZ, whose names are otherwise unknown to complainant but whose names will be supplied when ascertained, are all over the age of 21 years, or residents of Mobile County, Alabama, and are agents, members and/or pickets or one or more of the respondent Unions designated above.

13. Complainant has agreed to sell his crop of soy beans at the current market price, for export, on the basis of delivery at the Alabama State Docks Elevator, Mobile, Alabama, which is the only storage facility in the State of Alabama for soy beans grown for export in South Alabama, Northwest Florida, East and Southeast Mississippi.

14. There are at the present time in the Port of Mobile foreign flag ships awaiting loading and/or discharge of various cargoes, and in the coming days, additional foreign flag vessels are expected to arrive at the Port of Mobile

for loading and/or discharge of cargoes, including grain from the Alabama State Docks Elevator.

15. On or about 12:10 p.m. on November 3, 1971, several persons, acting under the authorization and direction of respondents and wearing sandwich boards placed themselves at or near the East and main gate of the Alabama State Docks Department. The signs carried by these individuals read substantially as follows:

"ATTENTION TO THE PUBLIC

The wages and benefits paid aboard the vessels SS AQUA GLORY and the SS BEL HUDSON are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.

Please do not patronize these vessels. Help the American seamen."

The BEL HUDSON is a foreign flag vessel, and was at the Alabama State Docks on or about October 1, 1971, ready to load up to 785,000 bushels of soy beans then in storage at such Docks Elevator, which would have given the Alabama State Docks Elevator room to store complainant's beans, said vessel could have been loaded in about 2-3 days. As a direct and proximate result of respondents posting and showing the above signs, the I.L.A. membership refused to load such vessels, resulting in the Elevator's being full of soy beans and complainant being unable to store

same in such Elevator, and resulting in a substantial financial loss to complainant. It was not until yesterday, November 8, 1971, that the BEL HUDSON was loaded, and such grain elevator will, in all probability, be closed tomorrow.

Complainant's beans must be harvested now, and should have been harvested 2 weeks ago. Complainant cannot sell his beans to anyone, if there is not storage for them at the Docks Elevator. If such Docks Elevator can't store complainant's beans, the complainant will lose his entire crop, which will rot in the field, thereby causing irreparable injury to complainant.

Complainant further avers that in the next 2-3 days, there will be a foreign flag vessel in the Port of Mobile, for the purpose of receiving grain from the Alabama State Docks Elevator, and respondents will be at the side of the vessel showing the same signs, with the same results, i.e., the I.L.A. will not load the vessel.

16. Notwithstanding a Federal Court Order to return to work, employees of members of complainant Mobile Steamship Association, Inc. represented by locals of the International Longshoremen's Association have refused to return to work because of the presence of said individuals wearing sandwich boards, notwithstanding efforts by members of the Mobile Steamship Association to obtain such employees for the loading and/or discharge of the aforesaid vessels.

17. The actions of respondents commenced without prior warning and respondents plan and intend to direct

such actions against the SS AQUA GLORY and SS BEL HUDSON and other vessels in similar situations to be loaded and/or unloaded by members of the Mobile Steamship Association, Inc.

18. Respondents have also directed employees of other employers and represented by respondents to refuse to provide any work or service with respect to such vessels.

19. Respondents' actions are directed at the SS AQUA GLORY and the SS BEL HUDSON and such acts together with the threat of such actions and interference directed at other such vessels constitute an unlawful interference with the contractual relations existing between the companies which own and operate the aforementioned vessels.

20. Respondents' actions are directed at the SS AQUA GLORY and the SS BEL HUDSON and such acts together with the threat of such actions and interference directed at other such vessels constitute an unlawful interference with the rights of the complainant to carry on his lawful business.

21. Complainant is continuing to suffer irreparable harm and grievous injury resulting from the actions aforesaid, which are acts of interference directed at the SS BEL HUDSON and is threatened with further irreparable injury through similar acts and conduct by respondents directed at other such vessels, in that he will lose the balance of his soy bean crop, estimated to be $12,000.00, which will result from respondents' actions which have impaired and

threatened to impair complainant's ability to sell his soy bean crop, with the resultant foreclosure and loss of his farm equipment. This action by respondents, acting together, and separately and severally, is an agreement, arrangement or understanding which prevents complainant from carrying on his lawful business of farming, without just cause or a legal excuse, in violation of Title 14, Section 54, Alabama Code, as recompiled, 1958. Such actions by respondents have resulted in a boycott of plaintiff's product, his soy beans, in violation of Section 56, Title 14, Code of Alabama, 1958, and a threat which prevents complainant from engaging in his lawful occupation of farming in violation of Section 57, Title 14, Code of Alabama, as recompiled, 1958.

Such actions by respondents amount to a potentially dangerous situation, which could easily involve violence, injury to persons and destruction of private and public property.

Such actions by respondents also violate complainant's rights guaranteed by the Constitution of the State of Alabama, Art. 1, Section 1 and 6.

22. Complainant has no adequate remedy at law for respondents' acts set forth hereinabove, and unless the respondents and each of them are restrained as hereinafter prayed, complainant and this community will suffer irreparable damage. Monetary damages in part cannot be calculated.

23. If the actions and interference by respondents as hereinabove specified has as its purpose the matters as set forth in the literature being distributed by said union agents and on said signs, the truth or accuracy of which complainant denies, complainant avers that the interest of respondents is greatly outweighed by the irreparable harm and damage that will be sustained by complainant, his fellow farmers, the community, and members of the community, if said acts of the respondents are allowed to continue.

Prayer for Process

Wherefore, complainant prays that said respondents and the respective servants, agents, officers, employees, pickets, members and representatives, separately and severally, of each of said respondents, separately and severally, be made parties hereto, and be required to plead, answer or demur hereto, within the time allowed by law.

Prayer for Relief

Complainant prays that this Honorable Court will immediately issue a temporary writ of injunction restraining and enjoining respondents and the respective agents, officers, servants, employees, members and representatives, separately and severally, of each of them, and those in active concert and participation with them, separately and severally, from:

1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any

part of the premises owned, occupied, or used by the Alabama State Docks Department, or, alternatively, taking any action which directly or indirectly, will interfere, in any manner whatsoever, with the ordering of any boat to the Alabama State Docks to take soy beans from its elevator or interfering, directly or indirectly, with the loading of such vessel.

2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for any members of the Mobile Steamship Association, Inc., insofar as is concerned any vessel which may be in the Port of Mobile to load soy beans from the State Docks Elevator.

3. Interfering with the operations of any member of the Mobile Steamship Association, Inc.

4. Picketing or interfering at or near premises used by any member of the Mobile Steamship Association, Inc. in a manner calculated to intimidate any of such members' employees or anyone working in association with such Association's members, or any other person entering or leaving or attempting to enter or leave such Association's members' premises, or calculated to induce any such persons not to report or apply for work at such Association members' premises, or any facility used by such Association's members.

5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

6. Interfering with the contractual relations existing or to exist between the members of the Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile.

And upon hearing of this cause this Honorable Court make the temporary injunction permanent.

Complainant further prays that the said injunction be in force and binding upon all the respondents above named and all other persons whosoever, even though not named herein, where such person has knowledge of such injunction or when such injunction and existence thereof be made known to any such person by personal service upon him or any of them of a copy of same.

Complainant further prays that complainant be allowed to recover from respondents damages and cost of suit herein incurred and be given such other, further and different relief as may be just and proper.

Robert E. Malone, Complainant

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
Solicitors for Complainant
P. O. Box 123
Mobile, Alabama 36601

By: Alex F. Lankford, III

APPENDIX I

Demurrer

Come the Respondents and demur to the bill of complaint and each and every aspect thereof, separately and severally, and assigns the following grounds, separately and severally:

1. There is no equity in the bill.

2. From aught that appears on the face of the complaint, the activities of the Respondents are protected by the First and Fourteenth Amendments of the United States Constitution.

3. From aught that appears the Court has no jurisdiction in the matters complained of.

4. From aught that appears the Respondents are protected by the Taft-Hartley Act.

5. From aught that appears the Respondents are protected by the Norris-LaGuardia Act.

6. From aught that appears the Complainant has an adequate remedy at law.

Dated this 10th day of November, 1971.

SCHULMAN, ABARBANEL, PERKEL & MCEVOY

By s/ Bertram Perkel

MOORE, MOORE, DOWNING & LAYDEN

By s/ Lionel L. Layden

SIMON AND WOOD

By s/ Otto E. Simon

APPENDIX J

Pleas

Come now the Respondents in the above styled cause and make the following pleas:

1. There is no equity in the bill.

2. The court lacks jurisdiction.

3. The Respondents are protected by the First and Fourteenth Amendments to the Constitution.

4. The Respondents are protected in their activities by the National Labor Relations Act which pre-empts the jurisdiction of the state courts.

5. Respondents further show unto this Honorable Court that it may not grant the relief sought by the Complainant because the Norris-LaGuardia Act (29 U.S.C.A. Sec. 101, et seq.) prohibits the issuance of any restraining order or temporary or permanent injunction by a State or Federal court in a peaceful labor dispute between parties in interstate commerce.

6. Respondents would further show that Complainant may not be granted the equitable relief that it seeks since they come to this Honorable Court with unclean hands in opposition to the public policy of the United States of

Appendix J

America as set forth in 46 U.S.C.A., Section 1101 and Section 1241.

Respectfuly submitted,

SIMON AND WOOD

By s/ Otto E. Simon

MOORE, MOORE, DOWNING & LAYDEN

By s/ Lionel L. Layden

SCHULMAN, ABARBANEL, PERKEL & MCEVOY

By s/ Bertram Perkel

Attorneys for Respondents

APPENDIX K

Answer

Come the Respondents and for answer to the Bill of Complaint filed in this cause, say as follows:

1. Respondents admit paragraphs 1 through 12 except there are some Respondents under 21 years of age and some Respondents are not citizens of Mobile County.

2. Respondents are not in a position to admit or deny paragraph 13 and demand strict proof thereof.

3. Respondents admit that part of paragraph 14 that at the present time there are foreign flag vessels in the port of Mobile, but has no knowledge of any foreign ships that are coming in forthcoming weeks and has no knowledge of any agreement they have with Mobile Steamship Association and demand strict proof thereof.

4. As to paragraph 15, Respondents admit picketing on November 3, 1971, but adds that the picket signs shown on the complaint is incorrect in that at the bottom of the picket sign were the following words: "we have no dispute with other vessels at this site."

5. Respondents deny the allegation of paragraph 16 because Exhibit A was not attached to the paper served on Respondents.

6. In paragraph 17 Respondents deny that they are in violation of a Federal Court Order, and have no personal knowledge of certain longshoremen who refused to work and demand strict proof thereof.

7. Respondents admit the allegations of paragraph 18, but informs the court that the SS BEL HUDSON picket lines

Appendix K

were removed and the ship has now sailed. Respondents also for answer say that they have the right to picket said ship under the Taft-Hartley Act, Norris-LaGuardia Act and the First and Fourteenth Amendments to the United States Constitution.

8. Respondents deny the allegations of paragraphs 19, 20, 21, 22, 23 and 24 and demand strict proof thereof.

And for further answer Respondents inform the court that under the First and Fourteenth Amendments of the United States Constitution, the Taft-Hartley Act and the Norris-LaGuardia Act they have a right to place informational pickets at the site of a foreign flag ship and that this right is protected by the aforesaid Constitution and laws of the United States.

Respondents further show unto the Court that picketing at all times was peaceful, lawful and protected by federal law.

Dated this 10th day of November, 1971.

SCHULMAN, ABARBANEL, PERKEL & MCEVOY

By s/ Bertram Perkel

MOORE, MOORE, DOWNING & LAYDEN

By s/ Lionel L. Layden

SIMON AND WOOD

By s/ Otto E. Simon

APPENDIX L

Assignment of Errors

IN THE

SUPREME COURT

OF THE STATE OF ALABAMA

1st Division No. 718

APPEAL FROM THE MOBILE COUNTY CIRCUIT COURT IN EQUITY

AMERICAN RADIO ASSOCIATION, *et al.*,
Appellants,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC.,
a non profit corporation

and

ROBERT E. MALONE,
Appellees.

Come now the Appellants in the above styled case and say that errors to the injury of the Appellants were committed by the Court on the hearing and in the proceedings in the court below and assign such errors as error, separately and severally, in the following separate and several assignments of error:

• • •

3. The trial court erred in its order of November 11, 1971, when it took jurisdiction of the subject matter of the suit. (Tr. Pgs. 139-142).

4. The trial court erred in its order of November 11, 1971, when the court took jurisdiction over the subject matter that was contrary to the law in this cause. (Tr. Pg. 139 and Pg. 143).

• • •

Appendix L

6. The trial court erred in its order of November 11, 1971, in overruling the demurrer to the complaint in that the activities of the Appellants were protected by the First and Fourteenth of the U. S. Constitution. (Tr. Pg. 139).

7. The trial court erred when it overruled the demurrer in its order of November 11, 1971, because it did not rule that the National Labor Relations Act preempted the jurisdiction of the State court. (Tr. Pg. 139).

• • •

9. The trial court erred when it did not sustain the plea of the Appellant that the court lacked jurisdiction. (Tr. Pg. 23 & 142).

10. The trial court erred when it did not sustain the plea that the Appellant was protected by the First and Fourteenth Amendment to the Constitution. (Tr. Pg. 23 & 142).

11. The trial court erred when it did not sustain the plea of the Appellants that their activities were protected by the National Labor Relations Act which preempts the jurisdiction of the state court. (Tr. Pg. 23 & 142).

• • •

SIMON AND WOOD

By: Otto E. Simon

Otto E. Simon

SCHULMAN, ABARBANEL, PERKEL & MCEVOY

By: Howard Schulman

Howard Schulman

Attorneys for Appellants

APPENDIX M

Minutes of Hearing

(26)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF ALABAMA

MOBILE, ALABAMA

EQUITY DIVISION

CASE NO. 81,679-B

MOBILE STEAMSHIP ASSOCIATION, INC., etc.,
Complainant,

vs.

AMERICAN RADIO ASSOCIATION, *et al,*
Respondents.

BE IT REMEMBERED: That, heretofore, on, to-wit, November 10th and 11th, 1971, the same being judicial days of the said Court, this cause came on for hearing on Complainant's Bill of Complaint seeking a writ of temporary injunction against Respondents before the Honorable William D. Bolling, sitting as Judge of the said Court; whereupon, the following testimony was offered and proceedings had, in due form of law:

Appendix M

Appearances:

For Complainants: Honorable Frank B. McRight, Honorable Kirk Shaw, P. O. Box 290, Mobile, Alabama.

For Respondents: Honorable Bertram Perkel (New York Bar), Honorable Otto E. Simon, Honorable James C. Wood, 1010 Van Antwerp Building, Mobile, Alabama.

For Intervenor Robert E. Malone: Honorable Alex F. Lankford, III, P.O. Box 123, Mobile, Alabama.

• • •

(33) Mr. Perkel: Your Honor, without interrupting, I think that a great deal of the material herein can be admitted by the parties, and if you would examine our answer, it may expedite everything before this Court. We have no doubt or no wish to say that we are not picketing; we have no wish to say we are not picketing with certain signs; we have no wish to say that our object is not to cause people not to do business with those ships; we have no problem with any of that. So it may expedite matters considerably if we can get this down to the legal issue, which is what we are really here for.

• • •

Appendix M

(42)

COMPLAINANT'S EXHIBIT No. 2

AFFIDAVIT

State of Alabama)
County of Mobile)

I, W.D. Walsh, after being duly sworn, depose and say:

1. I am President of Walsh Stevedoring Company, which is in the business of stevedoring and acting as steamship agents for vessels calling at the Port of Mobile. Walsh Stevedoring Company is a member of the Mobile Steamship Association, Inc. (hereinafter referred to as the "Association") and has authorized said Association to represent it in respect to matters involving labor relations. The Association is the duly authorized bargaining agent with respect to wages, hours and working conditions for Walsh Stevedoring Company and other members of the Association who are employers of labor in this port.

2. Several weeks ago, Walsh Stevedoring Company was engaged by the charterers of the SS BEL HUDSON and the SS ILKON TAK to perform the work of loading and/or discharge of said vessels. As a result of pickets which have been established by six maritime unions (American Radio Association, AFL-CIO; International Organization of Masters, Mates and Pilots, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; National Maritime Union of America, AFL-CIO; Radio (43) Officers Union of the United Telegraph Workers, AFL-CIO

Appendix M

and Seafarers International Union of North America, AFL-CIO) (all of said unions being hereinafter sometimes referred to as "Respondent Maritime Unions"), employees of Walsh Stevedoring Company represented by one or more locals of the International Longshoremen's Association have refused to cross said picket lines and perform work or services incident to said loading and/or discharge of said vessels resulting in work stoppages and/or delays. As a result, Walsh Stevedoring Company has sustained financial losses and has been caused to incur expenses incident to scheduling work which was interrupted or impeded by the aforesaid pickets.

3. In addition, our firm, Walsh Stevedoring Company, represents owners, operators and/or charterers of vessels on both a regular and casual basis who now are directing their vessels to other ports in the Gulf on account of the work stoppages resulting from the picketing being carried on by the Respondent Maritime Unions. As a result, our firm is being deprived of income which it would otherwise be earning and business which it would otherwise be conducting were it not for the said picketing.

4. As a result of the said work stoppages and delays and interference with its business and contractual relationships caused by said pickets, Walsh Stevedoring Company is losing large sums of money in the form of fixed overhead costs and lost agent and stevedoring fees.

W. D. Walsh

• • •

Appendix M

(44)

COMPLAINANT'S EXHIBIT No. 3

AFFIDAVIT

State of Alabama)
County of Mobile)

I, John T. Murray, Jr., after being duly sworn, depose and say:

1. I am President of Murray Stevedoring Company, Inc., which is in the business of stevedoring for vessels calling at the Port of Mobile. Murray Stevedoring Company is a member of the Mobile Steamship Association, Inc., (hereinafter referred to as the "Association") and has authorized said Association to represent it in respect to matters involving labor relations. The Association is the duly authorized bargaining agent with respect to wages, hours and working conditions for Murray Stevedoring Company and other members of the Association who are employers of labor in this port.

2. Several weeks ago, Murray Stevedoring Company was engaged by the receivers of cargo on the SS AQUA GLORY to perform the work of discharge of said vessel. As a result of pickets which have been established by six maritime unions (American Radio Association, AFL-CIO; International Organization of Masters, Mates and Pilots, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; National (45) Maritime Union of America, AFL-CIO; Radio Officers Union of the United Telegraph Workers, AFL-CIO; and Seafarers International Union of North America, AFL-CIO) (All of said unions being

hereinafter sometimes referred to as "Respondent Maritime Unions"), at that vessel, employees of Murray Stevedoring Company represented by one or more locals of the International Longshoremen's Association have refused to cross said picket lines and perform work or services incident to said discharge resulting in work stoppages and/or delays in the discharge of said vessel. As a result, Murray Stevedoring Company has sustained losses in income, etc. and has been caused to incur expenses incident to scheduling work which was interrupted or impeded by the aforesaid pickets.

3. In addition, our firm, Murray Stevedoring Company, contracts with owners of cargo on both a regular and casual basis who are directing vessels carrying their cargo to other ports on account of the work stoppages resulting from the picketing being carried on by the Respondent Maritime Unions. As a result, our firm is being deprived of income which it would otherwise be earning and business which it would otherwise be conducting were it not for the said picketing. Murray Stevedoring Company also represents shippers of cargo who are using other means of transportation due to the strike here.

4. As a result of the said work stoppages and delays and interference with its business and contractual relationships caused by said pickets Murray Stevedoring Company is losing large sums of money in the form of fixed overhead costs and stevedoring fees, as well as goodwill and reputation in the port for being able to provide prompt and efficient stevedoring services.

John T. Murray, Jr.

• • •

(46)

COMPLAINANT'S EXHIBIT No. 4

AFFIDAVIT

State of Alabama)
County of Mobile)

I, E. Rob Leatherbury, after being duly sworn, depose and say:

1. I am a Vice-President of Ryan Stevedoring Company, which is in the business of stevedoring for vessels calling at the Port of Mobile. Ryan Stevedoring Company is a member of the Mobile Steamship Association, Inc., (hereinafter referred to as the "Association") and has authorized said Association to represent it in respect to matters involving labor relations. The Association is the duly authorized bargaining agent with respect to wages, hours and working conditions for Ryan Stevedoring Company and other members of the Association who are employers of labor in this port.

2. Our firm, Ryan Stevedoring Company, contracts with owners and operators of vessels (of the type being picketed by the Respondent Maritime Unions herein) on both a regular and casual basis for stevedoring services who are directing their vessels to other ports on account of the work stoppages resulting from said picketing. As a result, our (47) firm is being deprived of income which it would otherwise be earning and business which it would otherwise be conducting were it not for the said

picketing. Ryan Stevedoring Company also contracts shippers of cargo who are using other means of transportation or other ports due to the strike here.

3. As a result of the said work stoppages and delays and interference with its business and contractual relationships caused by said pickets, Ryan Stevedoring Company is losing large sums of money in the form of fixed overhead costs and lost stevedoring fees.

E. Rob Leatherbury

• • •

COMPLAINANT'S EXHIBIT No. 5

This exhibit, affidavit of J. R. Macpherson, signed and notarized (48) November 10, 1971, because of the attached photographs, cannot be typed as a part of this transcript, and I so certify to the Clerk of the Court.

Nonie D. Stowe, Official Court Reporter

• • •

Mr. McRight: Your Honor, do you have the original in front of you?

The Court: Yes, sir.

Mr. McRight: It's got some exhibits that I will be referring to. Now, I will also mention that some of the exhibits are photographs which we were not able to duplicate—I did attempt and made Xerox copies

that are attached to copies I have given to attorneys, and I apologize for any inconvenience the absence of the original prints might cause, but they are attached to the original if they care to look at them.

The Court: All right, sir. Did you wish to read the affidavit?

Mr. McRight: Yes, sir, I do.

The Court: Go right ahead.

Mr. McRight: "State of Alabama, County of Mobile. I, J. R. Macpherson after being first duly sworn, depose and say: 1. I am President of the Mobile Steamship Association, Inc. (hereinafter referred to as the "Association"). The Mobile Steamship Association, Inc. is a nonprofit corporation organized and existing under the laws of the State of Alabama. Its principal place of business is located in the Commerce Building, Mobile, Alabama. The Association is composed of members who are engaged in the shipping industry in the Port of Mobile. There are two principal classifications of members of the Association. These classifications, with the membership shown afterwards, are as follows: Steamship Members, Alcoa Steamship Company, Anchor Shipping Company, Biehl and Co., Dalton Steamship Corporation, Delta Steamship Lines, East-West Shipping Agency, Fillette, Green and Company, Gulf-Puerto Rico Lines, Hasen and Tidemann, Lykes Brothers Steamship Company, Wayne McLean, Agent, Norton, Lilly and Company, Page and Jones, Steigler Shipping Company, Strachan Shipping Company, Walsh Stevedoring Company, Waterman Steamship Cor-

Appendix M

poration. Stevedore Members, Atlantic and Gulf Stevedoring Company, Cooper Stevedore Company, Dalton Steamship Corporation, Gulf Stevedoring Corporation, Murray Stevedoring Company, Pate Stevedoring Company, Rogers (49) Terminal and Shipping Company, Ryan Stevedoring Company, Walsh Shipping Company." Excuse me, I left out Strachan Shipping Company. "2. The Association is and for many years has been the duly designated collective bargaining agent for its members who are employers of labor in the Port of Mobile. In that capacity it has acted for and on behalf of its members employers concerning payment of wages, working conditions and other matters in connection with longshore work at the Port of Mobile. As such collective bargaining agent, it has entered into and fulfilled collective bargaining agreements with ILA Locals in the Port of Mobile concerning wages, working conditions and related matters. 3. On October 26, 1971, as a result of work stoppages by longshoremen in the Port of Mobile, the Association filed unfair labor practice charges with the National Labor Relations Board against various locals of the International Longshoremen's Association with whom it has collective bargaining relationships. These charges charged violation of Sections 8(b) (3) (refusal to bargain) and 8(b) (4) (i) (ii) (B) (secondary boycott) of the National Labor Relations Act, as amended. After investigation, the N.L.R.B. found that there was probable cause to believe that several of the charged unions had committed the practices charged by the Association and

Appendix M

commenced a proceeding under 10(1) of the N.L.R.A., in Federal District Court here in Mobile. The N.L.R.B.'s application for a Temporary Restraining Order in that proceeding was set for hearing at 10:30 A.M. on November 3, 1971, and, after brief argument, Judge Brevard Hand advised the parties at approximately 12:00 A.M. that the Temporary Restraining Order would issue against said ILA local unions; the said Order actually being signed at approximately 12:30 P.M. on November 3, 1971. Among other things, the Order enjoined the ILA local unions from continuing their strikes against, and refusal to perform services for members of the Association, in support of the labor dispute between the New York Shipping Association and ILA locals in the Port of New York. 4. On or about 12:10 P.M. on November 3, 1971, and almost simultaneously with the entry of the Temporary Restraining Order by Judge Hand individuals identifying themselves as representatives of the Respondents American Radio Association, AFL-CIO; International Organization of Masters, Mates and Pilots, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; National Maritime Union of America, AFL-CIO; Radio Officers Union of the United Telegraph Workers, AFL-CIO and Seafarers International Union of North America, AFL-CIO (50) (hereinafter sometimes collectively referred to as the "Respondent Maritime Unions") commenced picketing the East and main gates of the Alabama State Docks Department carrying signs or placards which read as

Appendix M

follows, to-wit: 'Attention to the Public. The wages and benefits paid aboard the vessel SS AQUA GLORY are substandard to those of the American seamen. This results in extreme damage to our wage standards and the loss of our jobs. Please do not patronize these vessels. Help the American seamen. We have no dispute with other vessels at this site.' Signed by the six respondent unions. '(Other placards carried by said pickets referred to the SS PHILIPPINE PRESIDENT QUEZON and the SS BEL HUDSON.). The photographs attached hereto as Exhibit A, Exhibit B and Exhibit C fairly and accurately depict some of said pickets and their signs or placards. Said pickets have also distributed leaflets, a true and correct copy of which it attached hereto as Exhibit D.' Your Honor, we will stop if you want to look at that now.

The Court: (After examining said Complainant's Exhibit No. 5) Go right ahead.

Mr. McRight: "5. The said pickets remained at the Main and East gates of the Alabama State Docks Department until approximately 4:40 A.M. on November 5, 1971. At approximately 4:40 A.M. on November 5, 1971, they moved from the Main and East gates of the Alabama State Docks Department to the Bulk Material Handling Plant and Pier 2 of the Alabama State Docks Department where the vessels SS ILKON TAK and SS AQUA GLORY (both foreign-flag vessels) were and are berthed awaiting loading and/or discharge. No pickets were established at the grain elevator of the Alabama State Docks Department or at the vessels SS BEL HUDSON and SS PHILIPPINE PRESIDENT QUEZON (both foreign-flag vessels) which

Appendix M

were berthed there. 6. Following issuance of the Temporary Restraining Order, members of the Mobile Steamship Association, Inc., in accordance with customary practice, have ordered gangs of longshoremen represented by International Longshoremen's Association, Local 1410 (Longshore Division) ("ILA Local 1410") for longshore work on the aforesaid foreign vessels. Said work orders have directed said gangs to report for work beginning on November 3, 1971, through present. Notwithstanding said work orders, employees represented by said ILA Local 1410 have refused to cross the picket lines established by the Respondent Maritime Unions and members of the Association have thus been prevented from performing stevedoring (51) services on those vessels being picketed. 7. The aforesaid failure or refusal to work by ILA represented employees has been stated by officials of said ILA unions to be the refusal by individual employees to cross the picket lines of the Respondent Maritime Unions. 8. I have been employed in the shipping industry in the Port of Mobile for the last 13 years. During that period of time I have been familiar with the maritime shipping operations conducted in the port and have been familiar with picketing that has been conducted in connection with that industry here. During that period of time I do not ever recall any picketing by all or any of the Respondent Maritime Unions in order or for the purpose of informing the public of the matters contained in the attached Exhibit D. 9. Approximately 60% of the deep-sea vessels that call at the Port of Mobile fly a foreign flag. A large percentage

of those foreign vessels carry a foreign flag different than the nationality of her crew. Vessels now being picketed by said Respondent Maritime Unions have called at the Port of Mobile on a number of other occasions and no pickets or other demonstrations were conducted by said unions. One of the vessels now being picketed, the SS AQUA GLORY, is on her third call to the Port of Mobile in the past 6 months. 10. As a result of the pickets which have been established by said Respondent Maritime Unions there has been a refusal by employees of members of the Association represented by ILA to cross said picket lines and perform the work of loading and/or unloading such vessels. As a result of such action, stevedore members of the Association have been prevented from performing stevedoring services for vessels and earning income therefrom. Walsh Stevedoring Company and Murray Stevedoring Company, members of the Association who have been engaged to unload the SS ILKON TAK and SS AQUA GLORY, respectively, have and are being prevented by the aforesaid pickets from performing stevedoring services for said vessels. 11. In addition to being President of the Association, I am the manager of Strachan Shipping Company in Mobile, which is in the business of providing service as a stevedore and steamship agent for vessels calling at the Port of Mobile. Strachan Shipping Company is a member of the Association and has authorized said Association to represent it in respect to matters involving labor relations. The Association is the duly authorized bargaining agent with respect to wages,

hours and working conditions for Strachan Shipping Company and other members of the Association who are employers of labor (52) in this port. My firm, Strachan Shipping Company, represents owners and operators of vessels on both a regular and casual basis who are now directing their vessels to other ports in the Gulf on account of the work stoppages resulting from the picketing being carried on by the Respondent Maritime Unions. As a result, our firm is being deprived of income which it would otherwise be earning and business which it would otherwise be conducting were it not for the said picketing. Strachan Shipping Company also represents shippers of cargo who are now using other means of transportation or other ports in the Gulf which are not strike bound on account of our inability here to load and unload cargo from vessels being picketed or expected to be picketed by the Respondent Maritime Unions. As a result of the foregoing, Strachan Shipping Company is losing large sums of money in fixed overhead costs and lost agent and stevedoring fees. 12. Work stoppages induced by the pickets, as aforesaid, has resulted and is resulting in irreparable injury to the Association and to its members and to others using the Port of Mobile in the following respects: a. The member companies of the Association are losing in excess of $15,000.00 per day in fixed overhead costs, including but not limited to offices, office and supervisory staff, and depreciation of equipment. b. Vessel demurrage costs range from $2,000.00 to $5,000.00 per day per vessel. c. During the normal course of business at the Port of Mobile, an average of some five vessels per day arrive

and depart from the Port of Mobile. The ocean freight revenues which are income for the industry at the rate of $35,000.00 per vessel per day. d. In addition to the above enumerated losses sustained by the Association and its members and their principals, the loss to the economy of the City of Mobile resulting from the work stoppage has been estimated to be in excess of $3,300,000.00 per week. Other forms of transportation, such as rail, barge, and truck lines which normally move cargo in or out of the Port area have been idle with resulting losses. Inland manufacturing plants are suffering the necessity of curtailing production and laying off personnel, all as a result of the inability of these plants to export their products and/or import raw materials used in the manufacturing process. e. In addition to the dock workers directly involved in work stoppages at the Port, a large number of other employees directly connected with the industry have been furloughed or laid off as a result of the strike. f. The facilities of the Alabama State Docks Department, (53) consisting of all of the public wharves in the Port of Mobile, among other things, have a cost value in excess of $50,000,000.00 and these facilities have been largely idle with resulting losses of revenues. g. Said pickets delayed the shipment of soybeans through the Port of Mobile. Unless these shipments are commenced and completed, without interruption, it has been estimated that the entire crop of approximately 13,000,000 bushels, valued at in excess of $50,000,000.00 will be lost. h. Vessels which normally call at the Port

of Mobile are being diverted to other ports. Other ports on the Gulf Coast are presently in operation and not under a strike (notably, the ports of Houston, Lake Charles, Galveston, Brownsville and New Orleans) and cargo that is normally shipped through the Port of Mobile has been and is being diverted to these ports or other forms of transportation. Additionally, foreign buyers and sellers are substituting other world markets for their sales and purchases because of the strike. Past experience has indicated that when a normal flow of trade is interrupted or diverted, a large percentage of that diverted will not revert to the Port of Mobile. Experience has indicated that business which the Port of Mobile is now losing will never be regained. 13. At the present time the Respondent Maritime Unions are picketing two vessels, the SS Ilkon Tak and the SS Aqua Glory. The parties sustaining the principal damage as a result of this picketing are the stevedores engaged to load and/or unload those vessels, the shippers and/or consignees of the cargo loaded or to be unloaded from those vessels and the Port of Mobile and community. If this and other such picketing is not ordered halted, the income lost will be irretrievable." And it's signed "J. R. Macpherson" on information and belief, and on the basis of such information and belief he says that the facts are true and correct.

Your Honor, this concludes the presentation of affidavits and evidence which we would offer in support of the relief requested.

Appendix M

The Court: Do you offer any oral testimony?
Mr. McRight: No, sir, we do not.
The Court: All right. I believe the next order then would probably be to look to the Intervenor. Do you have any proof you wish to submit?
Mr. Lankford: Yes, sir. If the Court please, I should like to offer as Intervenor's Exhibit 1 into evidence the Bill of Complaint and Intervention.

• • •

Appendix M

(62) Intervenor's Exhibit No. 2

Affidavit of Mrs. J. C. Bohanon

State of Alabama)
County of Mobile)

Personally appeared before me, the undersigned authority in and for said State of Alabama at Large, Mrs. J. C. Bohanon, and who being first duly sworn by me on oath doth depose and says the following:

My name is Mrs. J. C. Bohanon, wife of J. C. Bohanon, and we have 5 children still at home. My husband farms for a living, and our farm is located in Mobile County, at Chunchula, Alabama. We have had to borrow money for seed and fertilizer for this year's soy bean crop. We also have mortgages on our home and on our farm equipment. The notes on these obligations are due to be paid, in whole or in part, from the proceeds of sale of this Fall crop of soy beans. If we don't sell this crop of soy beans, my husband faces certain bankruptcy, and we will lose our farm and farm machinery which both of us have worked hard to keep.

The soy beans on our farm should have been harvested several weeks ago, but due to the delay in loading out grain from the Alabama State Docks warehouse into the grain boat Bel Hudson, we could not cut or harvest the beans, since we have no farm storage, and the only place that our beans can be stored is the Alabama State Docks elevator,

Appendix M

and it was full, due to the BEL HUDSON's not loading (although it had been at the elevator since October 1, 1971). The result is that the beans are (63) shattering, that is, the soy beans are falling out of their pods on the ground and cannot be harvested or combined. We have already lost money on the beans that we were able to harvest and which were put into the Alabama State Docks elevator, due to a lower market price because of lack of storage. Yesterday the Farm Production man told us that he estimated that we had already lost 10-12 bushels per acre, because of shattering.

If no grain boat will come to Mobile, or if one does come and it is not loaded due to pickets or other labor strife, we will have no place to store our grain (since it is my understanding that the Alabama State Docks elevator will probably be full tomorrow, November 10, 1971), nor do we have enough equipment to put it anywhere else, and the result is that we will lose the majority of our crop of soybeans, the value of which we estimate to be $65-70,000.00.

The reason that this Affidavit is made by me, and not by my husband, is that as at the time I am signing this, he is running a combine, harvesting our beans and hoping that he can get a truckload to the Alabama State Docks elevator before it closes in his face and will not accept any more for storage.

Mrs. J. C. Bohanon

• • •

Appendix M

(66) INTERVENOR'S EXHIBIT No. 3

AFFIDAVIT OF ROBERT C. MALONE

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned authority in and for said State of Alabama at Large, Robert C. Malone, who being first duly sworn by me on oath deposes and says the following:

My name is Robert C. Malone. I live in Wilmer, Mobile County, Alabama, and I rent a farm of about 250 acres upon which I grow soy beans. I had to borrow money from the Merchants National Bank of Mobile ($2,600.00) to pay the landlord rent for this farm, and this note is now overdue, and I am paying interest on same. I also have borrowed $30,000.00 from F.M.C.C. on my farm equipment. This note is also past due, and I am having to pay interest on same. The reason the notes are past due and I am in default is that labor trouble caused a delay in the loading out of the BEL HUDSON, which had been at the Alabama State Docks elevator right under the spouts, ready to load since October 1, 1971. The State Docks elevator is the only facility for storing soybeans that we farmers have in this area, and when it gets full then we are in real trouble. I have no farm storage or bins within which to place my beans. I have already lost approximately $3,500-4,000.00 on the beans that I was able to harvest and get sold and stored in various places.

Appendix M

My beans should have been cut 2 weeks ago. Their quality and grade is fast deteriorating, and if these beans are not harvested immediately, sold and placed in storage at the Alabama State Docks elevator (which is going to close tomorrow if it is not already closed today at the time I (67) am executing this Affidavit) I will lose my entire crop. I have agreed to sell my beans at the prevailing market price, but delivered in storage at the Alabama State Docks elevator, the only storage facility we have in this area.

Last night I took a load of beans and arrived at the elevator at approximately 6:30 p.m. There were 70 trucks in front of me, waiting to be unloaded. My truck was finally unloaded at about 1:55 a.m. this morning. It is only a matter of hours before the Alabama State Docks elevator closes its storage facilities to the farmers. I stand to lose approximately $12,000.00 if there is any labor strife or difficulty, strikes, picketing, etc., which keeps a grain boat from being at the Alabama State Docks elevator immediately, for immediate and continuous 24-hour loading. In other words, if the Alabama State Docks elevator can't store my beans, I can't sell the beans, they just stay in the field and rot.

I would estimate that there are approximately 150 farmers in Mobile County, Alabama, who grow soy beans, 75% of whom are in the same predicament that I have been put in by all of this labor trouble and particularly these union pickets.

Robert C. Malone

• • •

Appendix M

(75) Mr. Perkel: At this point in time I wish to advise you that in the interest of expediting this matter, with a particular view toward its importance to all parties, the attorneys have reached various stipulations on factual matters for the purpose of this hearing which we hope will be of some aid.

The Court: All right, sir.

Mr. Perkel: Your Honor, pre-marked Exhibit is by stipulation admitted into evidence with the following statement: Picket signs such as this Exhibit C bore the names of the ILKON TAK, the BEL HUDSON, the PRESIDENT QUEZON, and the AQUA GLORY when the picketing occurred outside the gate of the Alabama State Docks; and when picketing took place within the Alabama State Docks, the signs bore only the respective name of the ship being picketed at that time. The second item is that pickets picketed outside all of the entrances of the Alabama State Docks for two days, and then picketed proximate to the ships, such as the gangway of the ILKON TAK, and at the gate of the bulk loading facility with respect to the AQUA GLORIA. The next item is that no demand for recognition was made by respondents upon the complaint or any of its members. Next is that complainant or intervenor have no knowledge as to the picketing not being peaceful, or whether there have been any threats—and I think there is a further elaboration on that by intervenor's attorney.

Mr. Lankford: Yes. Judge, we have no knowledge of whether there was or there wasn't any such threat or any such violence that occurred on any picket line.

• • •

Appendix M

(76) J. R. MACPHERSON, the witness, called by the Respondents, having been first duly sworn by the Court to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

Direct examination by Mr. Perkel:

Q. State your name, please. A. J. R. Macpherson.

Q. I would ask you to take your affidavit which is in evidence as (77) Complainant's 5. (Witness complied.) I would ask you to address yourself to Page 8, if you would, please, particularly to the scratch-numbered paragraph—I can't quite make it out now—in the middle of the page, and the lettered items below it. Mr. Macpherson, can you tell me which members of the Association are losing in excess of $15,000.00 a day? A. This is information that has been given to our Association—our Steamship Association; I don't have the figures of the exact companies by name.

Q. Could you get it for us?

Mr. McRight: I would like to interject this objection: I think counsel has misread what was stated; what was stated was that the member companies of the Association are losing in excess of $15,000.00 per day. He is attempting to cross-examine this witness as to a meaning that each member of the Association is losing $15,000.00 per day. That's not what the statement says.

The Court: In overruling your objection, I will let the witness explain his answer if he wants to.

Mr. Perkel: Can you tell me how this figure was arrived at?

Appendix M

A. That figure was arrived at by calculating overhead of various stevedores and steamship companies, members of our Association have come up with, and they have no source of income at this time to pay for these overhead expenses and salaries producing no income.

Q. Can you tell me what day or what period of days this affidavit speaks of? What I am addressing myself to is this: I'm led to understand that one ship picketed one time, three ships picketed another time; so does this $15,000.00 figure speak to the time when one ship was picketed or when all ships were picketed? A. It pertains to any period that we are unable to work.

Q. So that it represents an average cost of all the picketing up and down now? A. Well, at the time this was prepared originally—there has been no work by the stevedoring companies since that time. One stevedore—and two, I suppose, both Walsh and Pate, have worked and it may have a slight bearing on the figure.

Q. Well, how many stevedores were included in this figure in the first place, and maybe we can figure it out, you know, how many— (78) A. I believe our list has ten.

Q. Were there ten vessels picketed? A. No, there were not ten vessels picketed.

Q. There were four vessels picketed at one time? A. Let me see; when the pickets were up at the gate, everything was blocked.

Q. I see. They are now not at the gate? A. Not at the gate. There are a few vessels, I believe, that are not picketed and they are being worked.

Q. Has your Association or have you calculated the cost to the members of the Association based upon the picketing

now being conducted proximate to the ships? A. Well, I don't think you can relate it to a ship basis; our pattern of trade is interrupted. We can't make a living on one ship a day and another ship two weeks from today; we deal in volume; we deal in twenty and thirty ships a month, and just because we are working one ship a day, that doesn't generate enough income or revenue to have any offsetting value.

Q. Could you give me some idea of how you arrived at the figure in d. of $3,300,000.00 per week—well, before we guess that one, how many ships do you know of being handled on a given day? How many berths—working berths have you got? A. At the State Docks?

Q. Yes. A. Twenty-seven berths.

Q. Is there a private facility that's not at the State Docks? A. There are two private facilities that are not located at the State Docks we can also work.

Q. And that twenty-seven includes all those facilities? A. Twenty-seven at the State Docks.

Q. At the State Docks. How many facilities do you have overall? A. Probably thirty.

Q. And aside from the first two days, I believe, when the picketing took place at all the gates of the State Docks, how many facilities have been tied up when picketing has taken place proximate to the ship? A. I don't understand your question.

Q. Well, we have thirty berths. How many berths were not working today (79) because of the picketing? A. Well, it's a difficult question to answer; because the picketing exists, no one wants to bring ships in here and have them tied up. As a matter of fact, I have a ship anchored —Strachan Shipping Company has a ship anchored on the

bar with 9,000 tons of steel; we won't bring it up to have it picketed—it would serve no purpose. There's another member that has a ship out there with cargo—

Q. Is that a Liberian flag ship? A. Both are Liberian flags. Why bring them up if they are going to be picketed?

Q. How many berths are working? A. How can they work under these circumstances?

Q. How many? A. I don't know if it's one grain berth or two grain berths that are working.

Q. But you have thirty facilities—thirty berths; how many of the thirty berths are working? A. Either one or two.

Q. You only have one or two berths working on the Port? A. Only the grain berths.

Q. How do you account for that Three Million Three a week? A. Those are taken from the Chamber of Commerce figures on the study that was conducted in the Mobile Area.

Q. I don't understand. The study of what? A. The study of the maritime industry—trade—I beg your pardon, I was referring to the wrong section.

Q. That's paragraph g. which starts on page 8. I was correct; that does pertain to the Chamber of Commerce study.

Q. Can you tell me when that figure speaks of? A. I don't have a date that it was filed; I cannot tell you.

Q. Was it compiled last year? A. I'm fairly certain it was compiled this year.

Q. This year? Relative to what? A. Relative to the maritime trade, the income that a vessel brings into the Port, money that would come into the Port if the normal trade was allowed.

Q. This is the Chamber of Commerce's opinion? (80) A. No, sir, it's not an opinion; it's a study.

Q. The Chamber of Commerce's study? A. That's right.

Q. As to how much revenue was brought into the City of Mobile by the operation of the Port? A. I would like to clarify it a little further; the Chamber of Commerce itself did not make the study, they had an independent outside firm make this study of the Port; it was out of Mobile.

Q. Did they publish it? A. It's on file at the Mobile Chamber of Commerce.

Q. Did they publish it? A. I don't know.

Q. Did they make it available to the public? A. They would make it available. The Mobile Chamber of Commerce—

Q. Did they pay for this study? A. I don't know who paid for the study.

Q. Then this study which is on file at the Chamber of Commerce, which they freely let people see, this says, I gather, that the maritime industry brings in Three Million Three into the Port; is that correct? A. That's basically—

Q. Per week? A. I guess that's right.

Q. Now, you have a statement on here—g. on page 9—delayed, or said picketing will cause the estimated entire crop of approximately 13,000,000 bushels, valued at excess of $50,000,000.00—will be lost. Is this based upon the assumption that the soybeans must be shipped through Mobile? A. Yes, sir.

Q. Must they, in fact, be shipped through Mobile? A. Well, I'm personally not a soybean farmer; I don't know what all the conditions are. I do know this, that there are not ample inland facilities to store soybeans in this

area; the farmers here rely on the Alabama State Docks elevator, not only as an export elevator but as a location to store soybeans after bringing them out of the fields.

Q. Are you familiar with Pascagoula Grain Elevator? A. Yes, I'm familiar with Pascagoula Grain Elevator.

Q. Do you know what their present status is over there? (81) A. Yes, I do.

Q. What is it? A. They started working their first vessel last Sunday morning at 7:00 o'clock; they finished loading it at midnight Tuesday—excuse me, Monday night; they started the second vessel at 8:00 o'clock this morning.

Q. Do you know whether they can take more grain or not? A. I do know this, at one time they were filled. They have loaded one ship; they probably have space now for one ship.

Q. Would you have any reason to doubt me if I said that a call was made not more than twenty minutes ago to the grain elevator who said essentially they will take everything you can send me?

Mr. Lankford: I'm going to object to any kind of speculation of what—

Mr. Perkel: Your Honor, I will lay the foundation subsequently.

The Court: Sustained.

Mr. Perkel: Your Honor, on what basis?

The Court: On the basis that you are not testifying, and that there is no evidence before this gentleman of that proposition; the Court sustains the objection.

Mr. Perkel: May we interrupt the testimony of this witness and put somebody on for that purpose,

Your Honor? I will connect it later if you wish, but I would prefer to do it now.

The Court: On the ground that it would be immaterial as to whether this gentleman would be surprised or not, the Court further sustains the objection on the ground that it's not within his knowledge.

Mr. Perkel: You have knowledge where Pascagoula is, don't you?

A. Yes.

Q. Do you know where Wilmer is? A. Pardon?

Q. Wilmer, Alabama? A. Vaguely. I live in Baldwin County; I don't live in Mobile County.

Q. Would you know whether Wilmer is closer to Mobile than Pascagoula? A. I don't have a map, and I don't.

Mr. Perkel: No further questions.

The Court: Any cross.

Mr. Lankford: Yes, sir.

(82) *Cross-examination by Mr. Lankford*:

Q. Mr. Macpherson, would you know whether or not a farmer can even get trucks to haul to Pascagoula—haul grain to Pascagoula? A. No, I wouldn't.

Q. Do you know whether or not the elevator at Pascagoula is operated on a lease by Louis Dreyfus Corporation? A. I do know that Louis Dreyfus has a lease that at one time was for 99 years.

Q. And it takes whosever grain it wants to take, and pays whatever price it wants to pay if you want to take it to that elevator—

Mr. Perkel: I don't mind questions; I don't like testimony from counsel.

Mr. Lankford: I'm asking him if he knows, please, and let me finish my question—it's cross-examination.

The Court: Just a minute now; you have all been real nice; but it's getting late now. Even though it's cross, Mr. Lankford, I still consider that Mr. Macpherson is basically your witness, and on the ground that you are leading him, I sustain the objection.

Mr. Lankford: All right, sir. Do you know whether or not Dreyfus as a practical matter makes the operation of this elevator at Pascagoula its private elevator?

A. I know that for a fact.

Q. All right, sir. Now, do you know whether or not the elevator at Alabama State Docks is a public elevator? A. There's no question about it being a public elevator; it's got to be a public elevator.

Q. And do you know whether or not the first vessel you said was loaded at Pascagoula was a Liberian flag vessel? A. No, sir, that's not correct.

Q. It was a Liberian flag— A. No, sir, it wasn't.

Q. Do you know whether or not tomorrow morning representatives of respondent unions might go over and picket the vessel at Pascagoula that is supposed to be loading right now? I mean these unions that are in this Courtroom. Do you know whether or not they are going over there to picket that vessel in Pascagoula in the morning?

(83) A. No, I don't know whether they are going or

not. From what counsel said a few minutes ago, I believe that we can look for some more picketing.

Q. Yes, sir. And do you know, Mr. Macpherson, whether or not these respondent unions—

Mr. Perkel: Your Honor, I must object at this point; this is really leading. I was sitting back and taking it because it really fundamentally is irrelevant, but it is getting late—

The Court: As to a question based upon the witness' lack of knowledge, the Court sustains the objection.

Mr. Lankford: Do I understand the Court to say that I can't ask him whether or not he knows?

The Court: If it's your thought that his answer would probably be no, he doesn't, the procedure would be of no value to the Court whatsoever because it would be two negatives.

Mr. Lankford: All right, sir. To your knowledge, Mr. Macpherson, are these respondent unions picketing New Orleans—the Port of New Orleans at the present time?

A. I know they did earlier. I think that they are being restrained from picketing over there. I don't know what the status is right now though.

Mr. Lankford: That's all I have.

The Court: Any redirect?

Mr. Perkel: No, your Honor.

The Court: You may step down. (Witness left stand.)

• • •

(85) RESPONDENTS' EXHIBIT B

(Formerly marked and referred to by Mr. Perkel as "EXHIBIT E".)

TO THE PUBLIC

American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

Our dispute here is limited to the vessel picketed at this site, the SS

American Radio Association AFL-CIO
International Organization of Masters Mates & Pilots AFL-CIO
National Marine Engineers Beneficial Association AFL-CIO
National Maritime Union of America AFL-CIO
Radio Officers Union of the United Telegraph Workers AFL-CIO
Seafarers International Union of North America AFL-CIO

• • •

Appendix M

(86)

RESPONDENTS' EXHIBIT C

AFFIDAVIT

Louis Neira, being duly sworn, deposes and says as follows:

That he is the Mobile Port Agent for the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water Districts, an affiliate of the defendant, Seafarers International Union of North America, and makes this affidavit in opposition to Plaintiff's application for a preliminary injunction. So that the Court will have the complete background, facts and events leading up to and constituting the issue of which Plaintiff is complaining, and concerning that which it is requesting injunctive relief from this Court restraining the Defendants, deponent sets forth the following facts:

For many years the job opportunities for American seamen aboard American Flag vessels has steadily decreased and such decline has been and is accelerating. This condition is best demonstrated by official publications of the United States Government. The United States Department of Commerce, Maritime Administration, publishes an annual report of its administration. The most recent report is for fiscal year 1970. Such report inter alia sets forth total United States seaborne foreign commerce and the percentage thereof carried by American Flag vessels, contrasted with foreign flag vessels. Attached hereto and made a part (87) hereof is Chart No. VI of such report demonstrating the above percentages.

The foregoing chart illustrates that in 1947 the total tons measured in millions of tons of United States commercial seaborne commerce was 142.2. For the year ending in 1969 said chart further illustrates that U. S. Commercial seaborne commerce increased to 427.79 million tons, an increase over 22 years of approximatley 300%. Notwithstanding such phenomonal increase in U. S. Commercial seaborne cargo, the percentages thereof carried by U. S. Flag vessels has steadily decreased and the foreign flag vessels carriage thereof has increased fantastically. The above mentioned chart again demonstrates that in 1947 U. S. flag vessels carried 57.6% of the aforesaid U. S. commercial seaborne commerce and in 22 years this carriage has been so decreased, that in 1969 the percentage was only 4.8; this status notwithstanding an increase of almost 300% in U. S. commercial seaborne commerce. Of course, conversely foreign flag vessels increased their percentage of transporting U. S. seaborne commerce from 42.6% in 1959 to 95.2% in 1969. And, most significantly, the above small percentage carried by U. S. foreign vessels in 1969, has been further diminished in the 22 months since the last official figure in 1969.

Appendix M

Relative to the number of seamen's berths or jobs aboard American Flag vessels, in 1947 there was substantially in excess of 100,000 such jobs. At the present time there are less than 31,000 such berths.

With respect to the ratio of seamen as an available pool to man such berths or jobs, to allow for vacations, leaves, illness, injury, and other reasons, bearing in mind the nature of the hazardous work, constant exposure to the sea, away from home and family, the approximate percentage is 2.2 to 2.4 seamen for every berth.

Appendix M

Applying the foregoing ratio to the foregoing jobs demonstrates that in 1947 approximately ¼ million American seamen followed this occupation supporting themselves, their families, and their communities. With the foregoing loss of transports U. S. seaborne commercial cargo to foreign flag vessels, the American seaman has presently been reduced to approximately 65,000 to 70,000 persons, but more significantly rapidly decreasing at an alarming rate.

The primary reason for the loss of American seaman jobs transporting U. S. commercial commerce to the foreign flags, has been the (88) substandard wages and conditions of foreign seamen contrasted to American Seamen. For an example, an American unlicensed seaman, depending upon his rating, will earn approximately $1200 a month as well as accruing substantial vacation, welfare and pension benefits. Attached hereto as Exhibit F through J are American seamen collective bargaining agreements setting forth their wages, benefits and employment conditions. Foreign flag unlicensed seamen transporting U.S. commerce will earn between 10 to 15% of American seaman earnings with little or no fringe benefits. Some such foreign seamen earn less than $100 per month with no benefits. In fact within the past approximate dozen years or so, non traditional minor nations such as Liberia and Panama merely give their flag to non citizens owners and operators of vessels with crews of Asiatics and Western European officers and such foreign flag vessels transport U.S. seaborne commerce with the foreign substandard wages and conditions contrasted to those of American seamen.

There are presently tens of thousands of American seamen who because of the above foreign substandard wages

Appendix M

and conditions contrasted to Americans are unable to secure employment and many of them are residents of and normally would sail out of Mobile. Unless the foregoing frightening picture is changed, most of the remaining American seamen, if not the American flag itself, will be swept from the seas and U. S. seaborne commerce will be handled practically exclusively by these foreign seamen.

Suffice it to state, the effect of this present condition on our balance of payments, as well as upon our merchant marine fleet for defense, as a nation, has been most adversely affected.

The American seaman union representatives, the Defendants herein, met in late October, 1971, and agreed to institute a program to peacefully and truthfully picket foreign vessels in U. S. Ports to publish and protest the loss of their livelihood to foreign flags ships with substandard wages and conditions contrasted to those of American seamen; to call to the attention of all Americans the above terrible condition and of the need and sole object of the American seaman unions and present their job opportunities as seaman for themselves in the United States.

As a consequence, picket signs were prepared (Exhibit A-1), written instructions as to the conduct of the informational or publicity (89) picketing distributed (Exhibit E) and leaflets to be distributed (Exhibit B). The above protested informative or publicity picketing commenced in the Port of Houston on or about October 28, 1971, and has been extended to the Ports of Philadelphia; Mobile; New Orleans; Wilmington; California; San Francisco; Portland, Oregon; Seattle, Washington; and Duluth, Minnesota, and will be extended to other ports as well subject to financial resources.

Appendix M

With respect to the Port of Mobile, which is the subject of this action, the following transpired.

On Monday and Tuesday, November 1 and 2, 1971, your Deponent spoke to Mr. Bob Hope, the State Docks Supervisor, and advised him of Defendant Unions request for permission to picket foreign flag vessels berthed in the State Docks rather than in front of the gate so as to limit the dispute to the picketed vessel. Receiving no such permission, on Wednesday at approximately 1:00 P.M., 4 pickets carrying the above mentioned picket signs, (Exhibit A-1), walked outside the front of the gate. The signs specifically pointed out that the dispute was with the vessels named on the picket signs. The leaflets distributed by the pickets (Exhibit B) further mentioned that the dispute was limited to such named vessels. The vessels named were the foreign flag vessels, Aqua Glory—Liberian flag; Bel Hudson—English flag; Phillipine President Quezon—Phillipine flag; and Ailkon Tak—Liberian flag.

On Friday, November 5, 1971, permission was granted to picket alongside the vessels. The pickets left the front gate and then with the above picket signs and leaflets restricted to the Liberian vessel, Aqua Glory, two pickets walked alongside that vessel. And, 4 pickets with their picket signs and leaflets restricted to the Liberian vessel, Ailkon Tak, walked alongside that vessel and these are the only vessels picketed at the State Docks at the present time.

All picketing has been peaceful and in accordance with the instructions set forth in Exhibit E.

Based on my observations, some persons patronized the above picketed vessels while others did not.

It should be pointed out that while the above two Liberian vessels are loading American cargo, soy bean products,

Appendix M

two American ships, which employ American seamen and transport the same type of cargo are laid up across the way from this operation because of inability to (90) obtain cargo. They are the Overseas Joyce, laid up in Mobile for approximately 3 months, and the Vantage Horizon, laid up in Mobile for approximately one month. The primary reason for such lay-up of non-cargo availability is because of the substandard wages and conditions of foreign flag seamen as contrasted to those of American seamen.

The Defendant Unions and their representatives are peacefully and truthfully picketing the above vessels to protest the loss of American seamen's livelihood to foreign flag ships with substandard wages and conditions contrasted to those of Americans. We are interested in, and it is our sole objective, to preserve our job opportunities for ourselves as American seamen in the United States. We have a dispute with these foreign flag vessels here in our country. We are exercising our rights as free American citizens, under long and cherished constitutional guarantees. And, it is this protest and the exercise of our constitutional rights, which the Plaintiff herein is seeking to deprive us of by securing an injunction from this court.

Deponent is advised that counsel for the Defendant unions are submitting legal memoranda demonstrating our rights to engage in the above peaceful and truthful conduct as well as further legal authority to demonstrate that Plaintiff is not entitled to injunctive relief against our unions from this Court.

WHEREFORE, it is respectfully prayed that Plaintiff be denied its requested relief and that its complaint be dismissed.

Louis Neira

■ ■ ■

Appendix M

(91) Mr. McRight: Your Honor, we have an objection as to the contents of this affidavit similar to the objection that was made to two of the affidavits marked in by the Intervening Complainant.

The Court: The only difference I see, he is actually a party to it. The ones that they were making most of their objections to had to do with the financial condition of some soy bean people.

Mr. McRight: Yes, sir.

Mr. Lankford: If the Court please, the objection was made and the Court sustained it to the affidavit of Robert E. Malone, the Intervenor, the intervening complainant.

The Court: All right. I haven't read Mr. Neira's affidavit; let me see what it is that's objectionable.

Mr. Simon: Judge, Mr. Neira is a party-respondent in this case, in addition to being the business agent for the Seafarers Union.

Mr. Lankford: Well, maybe we can save all this, Judge—

The Court: Tell us what it is.

Mr. Lankford: I would like to inquire of Mr. Simon if he is going to present Mr. Neira as a witness.

Mr. Simon: Yes, sir, we plan to.

Mr. Lankford: Well, then this affidavit is inadmissible in any event, if the Court please; it's not the best evidence. Here we've got the man sitting right here.

Appendix M

Mr. Perkel: Well, we have the same thing with Mr. Macpherson.

Mr. Lankford: We didn't call Mr. Macpherson.

Mr. Simon: We are going to touch on other matters with Mr. Neira that have come up in this proceeding, if the Court please.

The Court: I'm going to overrule the objection to the affidavit. Do you want to read it?

Mr. McRight: In its entirety?

The Court: Well, if you have any particular objection to it—

(92) Mr. McRight: Yes, sir, we do. First of all, Your Honor, I would call your attention to what purports to be the sixth page; the statement made that he knows all statements and facts therein to be true and correct in all respects. There are a number of statements and facts in here that on the face of the affidavit it is clear that no one man could know the things he says he knows; and I would make that objection to the whole of the affidavit, realizing perhaps what Your Honor's ruling on that objection will be.

The Court: Overruled.

Mr. McRight: Now, specifically, as to the second paragraph, the second sentence, "this condition", vis-a-vis, the loss of job opportunities mentioned in the first sentence—"this condition is best demonstrated by official publications of the United States Government." That obviously is a conclusion of the witness; we would object to it.

The Court: Overruled.

Mr. McRight: All right, sir. As to the paragraph beginning at the bottom of page one and terminating approximately one-third of the way down on page two, is what purports to be a summary of the chart which is appended as or identified as an exhibit to the affidavit; I make the objection that the chart speaks for itself and any purported summary of what the chart says is objectionable.

The Court: Overruled.

Mr. McRight: All right, sir. As to the last paragraph beginning on page two, "The primary reason" and ending "contrasted to American Seamen", there's no predicate laid for this witness to express that, what amounts to an opinion.

The Court: Sustain the objection on the ground that that's information not within the knowledge of the affiant, and the Court's going to order that conclusion stricken from the affidavit.

Mr. Simon: Judge, I would like to be heard—what did you say?

The Court: On the ground that it's a legal conclusion of the witness, I sustain the objection.

(Whereupon, Mr. Simon presented argument to the Court in opposition to the Court's ruling.)

The Court: If you put Mr. Neira on as a witness and prove his qualifications, I will reconsider my ruling. On the face of it, it does (93) not appear that he is that eminently qualified.

Mr. McRight: Your Honor, my next objection goes to the first full paragraph on page three, first as to the first sentence beginning "There are presently" and ending with "normally would sail out of Mobile", on the grounds that it's vague, it purports to say something that it doesn't specifically say, and on the further ground that no predicate's been laid to state that.

The Court: Overruled.

Mr. McRight: All right, sir. As to the second sentence in that same paragraph beginning "Unless the foregoing frightening picture" and ending with "by these foreign seamen"; while I appreciate the color of that sentence, I think it's inadmissible, irrelevant, incompetent, there's a failure to lay the predicate, it's inflammatory—and I can name more if Your Honor—

The Court: On the ground that that statement is inflammatory and contains some irrelevant matters, the Court will grant your motion and—

Mr. Simon: Judge, may I be heard just a second?

The Court: Mr. Simon, I'm not sure it's within Mr. Neira's knowledge whether this country's going to survive or not—

Mr. Simon: Your Honor, he's not saying survive—

The Court: He says the American flag itself will be swept from the seas—

Mr. Simon: Judge, there's an exhibit that's already been admitted into evidence that sets out these things by the Department of Commerce.

Mr. Lankford: Excuse me, Mr. Simon; I thought these were just identified.

Mr. Simon: I thought we had already agreed that they would be admitted; I thought we had already stipulated that they would be admitted.

Mr. Lankford: No, sir. We were never asked to stipulate that these exhibits—

Mr. Perkel: I don't know what we're talking about.

The Court: I don't either. The thing about the American flag, the Court is going to sustain the objection to that. What else, Mr. McRight?

(94) Mr. McRight: The next full paragraph, "Suffice it to state"; with that predicate I think it's redundant; certainly there's no showing that this witness has a basis upon which to make the statement.

The Court: Overruled.

Mr. McRight: The next paragraph, Your Honor, beginning "The American seaman union representatives", ending on the next page "for themselves in the United States"; there's no basis that this witness knows that that's what, in fact, occurred.

The Court: Overruled.

Mr. McRight: All right, sir. Over to page five, in the paragraph in the middle of the page, "It should be pointed out"; we object to the first sentence, particularly insofar as it attempts to show why two American ships are laid up, again there's no basis shown that this witness knows why they were laid up because of inability to obtain cargo.

The Court: Overruled.

Mr. McRight: All right, sir. The last sentence in that paragraph, "The primary reason for such lay-up" and ending "as contrasted to those of American seamen"—

The Court: As to what the primary reason for something is, the Court considers that a legal conclusion; and I sustain your objection.

Mr. Perkel: Your Honor, may I be heard on that for one moment?

The Court; All right, go ahead.

(Whereupon, Mr. Perkel presented argument to the Court in opposition to the Court's ruling.)

The Court: Sustain the objection.

Mr. Lankford: Judge, may I be heard for just a minute? I realize you sustained the objection, but he has raised a point I would like to respond to.

The Court: Yes, sir.

(Whereupon, Mr. Lankford presented argument to the Court in response to Mr. Perkel's argument.)

The Court: I will get into that later.

Mr. Lankford: Yes, sir.

(95) Mr. McRight: All right. The last complete sentence on that page—

The Court: "We are exercising our rights as free American citizens—"; I think that invades the province of the Court. I believe that's the ultimate

question for the Court's decision; and on that ground, the Court sustains the objection.

Mr. McRight: And on the same ground, Your Honor, the next sentence which is at the top of page six.

The Court: On the ground that that invades the province of the Court, and that's the ultimate question, the Court sustains the objection.

Mr. McRight: And we will object to the next complete paragraph beginning "Deponent is advised" and ending "from this Court", on the grounds that that is the ultimate question and invades the province of the Court.

The Court: I think that's a factual matter, that they are going to help the Court with their legal authority, and I overrule your objection. Anything further?

Mr. McRight: Not on this.

The Court: Do you want to read in the affidavit—

Mr. Lankford: May I just be heard briefly?

The Court: Yes, sir.

Mr. Lankford: I tried to follow Your Honor as closely as I could; I'll try not to be redundant. It's perfectly obvious, if it please the Court, that a great portion of this affidavit—and I refer to page one beginning with the second paragraph, "This condition is best demonstrated" and going on to "The United States Department of Commerce", the remainder of that paragraph; the last paragraph be-

ginning on page one and ending over on page two, is patently based on a U. S. Department of Commerce document which is not in evidence. How much else is based on it, I don't know, but that is plainly objectionable, if the Court please.

Mr. Simon: Judge, the main witness, Mr. Macpherson, in his deposition used figures coming from the Chamber of Commerce, which is not nearly as official as the U. S. Department of Justice. All through the application for an injunction and his affidavit supporting it. And if that was admitted by the Court, there's no reason that this should not (96) be equally admissible.

Mr. Lankford: There was no objection made to that, Judge. I again—the statement on page three where it talks about our international balance of payments and everything, we object to that.

Mr. Simon: Judge, we couldn't object to it because it was in their petition, sworn to by Mr. Mcpherson, the Mobile Chamber of Commerce figures.

The Court: Gentlemen, I'm going to do this; I'm not saying that every statement in here of Mr. Neira is going to be earth-shaking in the Court's decision, but I am going to say this; the procedure is supposedly informal. You know that most affidavits have hearsay in them; you know that. If the gentleman has taken the trouble to depose to this Court facts which he thinks will help the Court, and I believe that I may have some ability to disregard matters that I think are of no value, I'm going to let most of it in for what it's worth.

Appendix M

Mr. Lankford: All right, sir.

The Court: Do you want to read the affidavit?

Mr. Simon: I would like to try, sir.

The Court: All right, sir.

Mr. Lankford: Are you going to let him read the whole thing as though it's all admissible?

The Court: Except for what I sustained Mr. McRight's objections to.

• • •

(107) LOUIS NEIRA, the witness, called by the Respondents, having been first duly sworn by the Court to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

Direct examination by Mr. Perkel:

Q. Mr. Neira, would you give your name to the Reporter? A. Louis Neira.

Q. Would you tell us what your occupation is, Mr. Neira? A. I am the Port Agent of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water Districts.

Q. Where are you stationed? A. Mobile, Alabama.

Q. How long have you been Port Agent? A. Twelve years.

Q. What did you do prior to that, Mr. Neira? A. I was the Agent of Miami, Florida for two years; and prior to that I was an organizer and patrolman in the Port of Mobile since 1945.

Q. Can I go back before that? A. No, sir. Yes, you can, if you wish.

Appendix M

Q. How long have you been associated with the maritime industry? (108) A. Since 1933.

Q. In many capacities? A. As a seaman; as a member of the strikes of the thirties; picket lines; as an organizer —voluntary organizer through the thirties and forties; went to war; come back into Mobile and was elected as an official in 1945.

Q. Mr. Neira, sometime at the end of October did you receive any communication from your Union concerning the picketing in question here? A. I did.

Q. Could you tell us essentially what information you received, what your instructions were, and stop at that point and then we will get on to what you did?

Mr. Lankford: We are going to object; it calls for obvious hearsay.

The Court: Sustained.

Mr. Perkel: Mr. Neira, I show you Respondents' Exhibit E for identification, and ask you to examine it.

A. This is a letter from—

Q. Have you examined it? A. Yes, sir.

Q. Are you familiar with it? A. Yes, I am.

Q. Could you tell us how you got it? A. I received that from Mr. George McCartney of New York who arrived in Mobile November the first at 3:00 P.M. to inform me that the policy was to go—well, we were going out and strike every foreign flag ship in the Port of Mobile. He gave me a copy of my instructions—

Q. Are those the instructions there? A. They are. He gave me some leaflets—

Q. Just a moment, Mr. Neira. I show you Respondents' Exhibit B for identification; is that the exhibit you referred to? A. It is.

Q. Yes. What else? A. And some packets.

Q. Picket signs? A. Yes, picket signs.

Q. I ask you if this is a facsimile of that picket sign? I'm showing (109) you Respondents' Exhibit A-1 for identification. A. It is.

Q. Then what did you do, Mr. Neira? A. I called a meeting with all the officials of the various Maritime Unions in the Port of Mobile.

Q. Did any of them advise you that they received similar calls?

Mr. Lankford: I object to his leading the witness; and it calls for hearsay, also.

The Court: Overruled.

Mr. Lankford: We except.

Witness: Mr. Malloy of the Marine Engineers Beneficial Association, District No. 1—

Mr. Lankford: Now, if the Court please—

The Court: Now, that would. I believe I see Mr. Malloy here in Court. Anything that Mr. Malloy said is hearsay.

Mr. Perkel: Will you tell us who was at the meeting?

A. Chuck Malloy, Robert Jordan.

Q. Could you tell us what you said at the meeting? A. We arranged—

Q. Now, Mr. Neira, listen to my question carefully. Could you tell us what you said at the meeting? A. I said

that we were going to picket the foreign flag ships in the Port of Mobile.

Q. And as a result of that meeting, will you tell us what happened? A. I had Mr. Malloy arrange a meeting with Mr. Robert Hope, General Manager of the Alabama State Docks, for the purpose of setting up picket lines under the gentleman's agreement that we had in the previous managements prior to the new one coming in.

Mr. Lankford: Naturally we're going to have to object to whatever gentlemen's agreement they had.

The Court: Sustained.

Mr. Perkel: Mr. Neira, when was this meeting?

A. Monday, 4:00 P.M., November the first.

Q. Was any action taken by your organization or the collective organization to your knowledge as a result of that meeting? A. What type action are you talking about?

Q. Was any action taken? (110) A. Other than we tried to make a meeting for that afternoon with the various officials of the Alabama State Docks.

Q. Did there come a time when you did start picketing? A. We started picketing Wednesday at noon.

Q. Did you send pickets out? A. Yes, sir.

Q. Will you tell me what you said to the pickets and what instructions you gave them?

Mr. Lankford: I object to that as hearsay.

The Court: Overruled.

Witness: My instructions to the pickets were that we were going to picket the Alabama State Docks, you were to carry these placards, you were

to take these leaflets with you, you were to speak to no one, and if anyone should ask you any question you were to simply give them a leaflet and continue your picketing.

Mr. Perkel: Did you explain to the pickets what the issue was about as you understood it?

A. Well, I did, but you can—

Q. What did you say to them? A. I told them that we were going to picket these foreign flag ships, and they told me it was about time due to the fact that the merchant seamen, especially the American seamen, is being put on the beach due to lack of berths, and I mean jobs, because the American operator cannot compete with a foreign flag ship in any type of cargo, irregardless what type it is.

Q. How many men do you have on the beach now? A. At the present time we have 357 men on the beach.

Q. How many did you have on the beach last year at this time? A. I would say in the vicinity of 200.

Q. And the year before? A. The same amount, about 200.

Q. Mr. Neira, how long does it take for a man to get a berth out of your hall now? A. Well, I would say in the neighborhood of 80 to 89 days.

Q. After he registers, 80 days to— A. From the day he registers, within 80 to 89 days.

Q. I will ask you, Mr. Neira, if you recall how long last year at this (111) time it took a man to get a berth out of your hall? A. I would say that in less than 30 days he could get a berth.

Q. Have you any recollection of the year before that? A. Prior to that he could get one any day.

Q. Mr. Neira, I show you Respondents' Exhibit F marked for identification and ask you whether you can identify that for us? A. I sure can.

Q. Tell us what it is. A. That is the contract of the Seafarers International Union covering the freightships under contract with the SIU.

Q. Mr. Neira, I'm going to show you Respondents' Exhibits G, H, I and J, and just ask whether you are familiar with them. Don't go further than that. Are you, or are you not familiar with them, and any one you are not familiar with, just tell us which one that is. A. I'm very familiar with the NMU contracts.

Q. Would you identify them by letter. A. Exhibits H and G; I'm very familiar with those contracts. I'm not too familiar with I or J.

Q. Do you know whether these are in fact the contracts? A. They are.

Q. That is, G and H are in fact the contracts between the Unions and the operators? A. They are.

Q. Have you seen them before? A. I picked them up from the National Maritime Union.

Q. Now, with respect to the ARA and ROU, the American Radio Association and the Radio Officers' Union, J and I, respectively, have you seen these before? A. Yes, I have. I've seen them at Headquarters in New York; they've got a copy of all these contracts.

Q. Do they keep a regular file on that? A. Yes, they do.

Mr. Perkel: Your Honor, at this point I think for the purposes of this hearing, I would like to offer into evidence at this hearing for whatever

Appendix M

weight the Court deems to give them, Exhibits F, E, D, G, H, I, J and A-1.

The Court: I think they are nearly all already in, aren't they?

(112) Court Reporter: Except for E.

Mr. Perkel: I thought that they were offered and that there was a question in relation to them—

The Court: There's one there, instructions to the pickets; no predicate had been laid, but based on Mr. Neira's testimony at this time—is this (Respondents' Exhibit E for identification) what you gave your men?

Witness: No, Your Honor.

The Court: Are you familiar with that?

Witness: Yes, these are the instructions. We gave them the leaflets, and these instructions were not issued to the pickets.

The Court: Where did you get these from?

Witness: I received these instructions along with my leaflets from Mr. McCartney who flew in from New Orleans and brought the necessary documents for me.

The Court: And that was part of your picketing?

Witness: That's exactly right, Your Honor.

The Court: All right, thank you, sir. I believe that's the only one that's not in, Mr. Perkel; and you can mark it in, Mrs. Stowe.

• • •

Appendix M

RESPONDENTS' EXHIBIT E

(Instructions)

Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.

In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.

Our organization will participate in carrying out this publicity picketing.

In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.

1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the (113) Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.

2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be instructed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.

3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which

Appendix M

they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call their Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

7. No one has authority to change these instructions except upon specific written authority from your Headquarters.

• • •

Mr. Perkel: That's all I have, Your Honor.
The Court: Is there cross?
Mr. McRight: Yes, sir.

Appendix M

Cross-examination by Mr. McRight:

Q. Mr. Neira, do I understand that the purpose of your picketing here in the Port of Mobile—when I say "your", by that I mean all the Maritime Unions that are in fact picketing—is to publicize what you say on your placards and say in the handbills that you give out? A. We want to bring to the attention of the American citizens of this country the plight of the American merchant marine, and the only way we can do it is by making this type of demonstration in order that we can bring it to the attention of the public, for without this we wouldn't receive the TV coverage that we've gotten. The only people who we might (114) have contacted were those on the water front; but we were fortunate through the TV to bring this to the attention of every Mobilian in this area of this television station.

Q. All right, sir. Did you give any thought to issuing any public statements or prepared statements of any kind to the public? A. My instructions were on public statements that they, whoever wanted them, were to contact our national headquarters in New York and they would be very happy to supply them with any information they wanted.

Q. Do you know if in fact any such statements have been entered or rendered, Mr. Neira? A. To my knowledge, no, sir.

Q. All right, sir. Did you, Mr. Neira, and the Port of Mobile—the Unions here give any thought to making any public statement over the radio? A. We were instructed to give no reports or no statements.

Q. You just went out and picketed; that's the publicity that you were going to accomplish? A. Yes, sir.

Q. All right. Now, did you give any thought, Mr. Neira, as to what effect that picketing would have on longshoremen in the Port of Mobile? A. We gave thought that everybody, especially the 700 families of Mobile SIU people alone who have gone hungry because they haven't got no jobs on account of these foreign flag ships.

Q. All right, I understand your position, but let's go back to my question. Did you give any thought, Mr. Neira, to the effect that your pickets would have on the longshoremen in the Port of Mobile? A. What effect?

Q. That's what I'm asking you. Did you give any thought to it? A. We gave it no thought. We were just out there to inform the public of our plight.

Q. Well, would you consider longshoremen part of the public? A. We consider every human being.

Q. Yes, sir. Would you consider longshoremen a part of the public that you intended to inform? A. Oh, yes, sir, definitely.

Q. All right. Now, Mr. Neira, wouldn't it be fair to say that most Union men don't cross picket lines? (115) A. Oh, that's definite.

Q. Yes, sir. And you knew that when you put this picket line up, did you not? A. No, sir, I did not because we put the picket line up there and several hundred men—Union men crossed it every day.

Q. What about ILA, Mr. Neira? A. I don't know who they were.

Q. Sir? A. I don't know who they were.

Q. Have you witnessed the pickets in operation? A. Yes, sir.

Q. Have you seen any longshoremen cross the picket line? A. Yes, I did.

Q. Where was that? A. It was at the grain elevator.

Q. You had pickets at the grain elevator? A. No, we didn't have them; other people had them.

Q. Who had pickets there? A. I don't recall; there was no name on the picket.

Q. No name on the picket? A. No; that's correct.

Q. There were pickets up with no name to identify them? A. That's right.

Q. They were pickets of one of the respondents in this case? A. No, sir, they were not one of the pickets of the respondents.

Q. When was this, Mr. Neira? A. I believe it was Friday.

Q. Friday of last week? A. Yes, sir.

Q. And have you seen any longshoremen cross any picket lines that you established? A. To my knowledge, no.

Q. Isn't it, as a matter of fact, Mr. Neira, that you knew when you established these picket lines that longshoremen would not cross the picket lines? A. No, sir, we didn't.

Q. Sir? A. We did not.

(116) Q. Well, you had—

> Mr. Perkel: I think maybe I can make counsel's life a little easier by making the following report to counsel; that we have had more than a reasonable hope and expectation based upon past practice of the longshoremen to not cross picket lines, and nobody was surprised when they did it; in fact, I must say that I think everybody involved fully expected long-

shoremen, if they agreed with us, not to cross the picket line.

The Court: Very well, sir.

Mr. McRight: All right. Now, Mr. Neira, at any time subsequent to the time you established your picket line, did you learn that there was an injunction against the longshoremen in the Port of Mobile and those acting in concert with them—

A. No, sir—

Q. Wait just a minute—from refusing to perform services for members of the Mobile Steamship Association?

Mr. Perkel: Objection—

The Court: Well, his answer was no, he did not.

Mr. Perkel: Well, I would like to—since we may pursue this along the line a little further—I would like to state to the Court that the terms of the injunction cannot be stated so simply, that there probably are conditions, as this Court is well aware, that, notwithstanding an injunction, people can still picket provided they don't picket for the unlawful purpose of the injunction—that is, longshoremen. If the Mobile Association, for instance, committed an unfair labor practice, you could have an unfair labor practice strike at the Docks today, notwithstanding the injunction. So, if counsel is going to refer to that, I would appreciate it if he would keep it within its own terms.

Mr. McRight: I'll be glad to.

The Court: All right, sir.

Mr. McRight: Mr. Neira, you knew there was an injunction against ILA in the Port of Mobile, didn't you?

A. When?

Q. Right now, sir. A. Right now?

Q. Yes. A. Yes, I do.

(117) Q. And when did you know that—when did that first come to your knowledge? A. It come to my knowledge Wednesday in the afternoon.

Q. All right, sir. Now, at that time did you take it upon yourself to learn the terms of the injunction? A. No, sir.

Q. Did you read it? A. No, sir.

Q. Did anyone in your organization read it? A. To my knowledge I wouldn't know that.

Q. What was your understanding from what you read about the injunction, Mr. Neira, as to what it said? A. I was too busy trying to get a meeting with the State Docks operators to put my own picket line up there. I had been trying—

Q. You didn't understand at all— A. No, sir, I had been trying for thirty-six—

Q. —the terms of the injunction? A. —hours from Monday until Wednesday to get permission to picket dockside. I didn't have time to worry about the longshoremen.

Q. Then you have gotten that permission, or you have started picketing dockside—

Mr. Perkel: Your Honor—

Witness: We did not get the permission—

The Court: Just a minute; Mr. Perkel has an objection.

Mr. Perkel: I object on the ground of relevance. I would very much like that this matter be relevant in this case as I am quite certain that if counsel is going to prove what I can't prove with the longshoremen, then he has also proved that this Court is obviously preempted from jurisdiction because as before it has no right to enforce the order. But other than that, I don't see the relevance of that in light of my prior statement as to this part of the questioning.

The Court: He has the right to a thorough and sifting cross examination, and the Court overrules your objection.

Mr. McRight: All right, sir. Now, when you started picketing dockside, did this free your time so that you could learn what the injunction said?

A. That was Friday; yes, sir.

(118) Q. Yes, sir. Have you learned? A. Well, I know that they issued the injunction against the longshoremen.

Q. What is your knowledge of what that injunction says? A. Well, when the Judge tells me I can't picket, that's it, period—unless I want to go to jail for contempt.

Q. All right, sir. What about—what is your knowledge of the injunction as it applies to the longshoremen? A. I don't understand your question. I don't know what you're trying to get at.

Q. Well, that's not for you to decide right now, Mr. Neira. What I'm trying— A. Well, I think it is. I've got to answer it.

Q. Okay. Well, you answer my question and we will get to what I want to get at.

Mr. Simon: Judge, he's arguing with the witness.

The Court: Don't you all argue, Mr. McRight—

Mr. Simon: Mr. McRight is arguing, Judge. Anytime he has asked Mr. Neira a direct question he has gotten a direct answer.

The Court: Restate your question, Mr. McRight.

Mr. McRight: All right, sir. Mr. Neira, my question to you is, what is your understanding of what the injunction against the International Longshoremen's Association in the Port of Mobile entered last Wednesday said?

A. Last Wednesday?

Q. Yes, sir. A. I didn't read Wednesday's paper.

Q. Okay. Whenever you read it, what is your understanding of what the injunction said? A. My understanding according to Judge Hand was that they were supposed to go back to work.

Q. All right, sir. And you put up a picket line at the State Docks with the understanding that Judge Hand had told the longshoremen to go back to work, and with your understanding and belief as stated by your counsel that your picket line would prevent them from coming back to work; is that correct? A. My attorney said it would prevent them from going back to work?

(119) Q. That they anticipated that picket line, and hoped that they would not cross— A. I don't know how he knows that. He's just assuming that a good Union man will not cross nobody's picket line.

Q. Mr. Neira, you assumed that a good Union man wouldn't cross your picket line before you put it up, didn't you? A. Yes, sir.

Q. All right, sir. And you assumed, too, did you not, that the ILA had good Union men in its ranks here in the Port of Mobile? A. Yes, sir.

Q. All right. Now, my question to you again is that with your understanding of Judge Hand's order, that it required longshoremen to go back to work, is it your testimony that the six respondent Unions here established picket lines when, in fact, you assumed that the picket line that you established would prevent those employees from going back to work?

The Court: On the ground that I don't believe I understand the question, I'm going to sustain an objection to it.

Mr. McRight: All right, sir. I'll rephrase it.

Mr. Layden: Judge, is he saying—

The Court: Well, I didn't understand it—

Mr. Layden: The witness can't understand, he says, at what time; because apparently the picket lines were up before there was any injunction. So if he will be specific, he can get an answer.

Mr. McRight: Okay. Mr. Neria, when did you come to the understanding that Judge Hand's order told the International Longshoremen's Association here in the Port of Mobile to go back to work?

A. About three hours after I established my picket line.

Q. All right, sir. Now, at that point did you put up or leave up any pickets? A. I left the pickets up until midnight that night.

Q. All right, sir. And has picketing continued since that time? A. Yes, it has.

Q. Okay. Now, from that moment on, that is three hours after you learned or after the injunction was issued, until now do I understand you to say that your Union and the other Unions that are respondents here established a picket line knowing and believing that ILA men would refuse (120) to cross that picket line, when you knew that Judge Hand had told those people to go back to work? A. No, I don't know about that because when we established our picket lines we didn't ask nobody to cross the picket line or not cross that picket line, and I do know that a bunch of ILA men up at the State Docks did cross the picket line. So I don't know what you're getting at. I mean, there's a bunch of ILA men crossing that picket line every day up there.

Q. These are employees of the Alabama State Docks? A. I don't know anything about that. All I know is that members of the International Longshoremen's Association are crossing our picket line every day.

Q. You mean to tell me that you know which Union they are in, but you don't know who they work for? A. All I know is that they are members of ILA's Union, period. I do know that.

Q. Are any longshoremen crossing your picket line? A. I beg your pardon?

Q. Are any longshoremen crossing— A. I don't know.

Q. Yes, sir. Mr. Neira, do I understand that your pickets now are directed at Liberian vessels? A. Yes, it is.

Q. Isn't it true that you've received instructions to picket all foreign vessels? A. Within my resources.

Q. Sir? A. Within my resources.

Q. Well, there are other foreign vessels at the Alabama State Docks, though, aren't there? A. I couldn't tell you.

Q. Is it your instruction to picket English vessels? A. My instructions were to picket foreign flag ships.

Q. All foreign flag ships? A. All foreign flag ships. But we also investigated, and when we found out that these foreign flag ships, such as the Bel Hudson—I'm sure that's who you are talking about, an English flag ship, when we (121) found out that the nationals aboard that vessel were all English, we removed the picket line from it. When we found that the Philippine President Quezon was a Philippine flag ship with all Philippine nationals aboard her, we removed the picket line from that. When we found out that the Aqua Glory, a Liberian runaway with a bunch of Greeks on there working for about Forty-Five bucks a month, we kept the picket line there.

Q. All right, sir. In other words, you reached the independent conclusion in the Port of Mobile that you were going to picket only foreign vessels that had crews different from the flag of the vessel? A. I would assume that would be right.

Q. Yes, sir. Now, in your affidavit, Mr. Neira, you indicate that there are two Liberian vessels loading soy beans in the Port of Mobile; is that correct? A. Two Liberian vessels loading—

Mr. Perkel: Would you indicate the page number, please?

Mr. McRight: Page five. You state that it should be pointed out that while the above two Liberian

vessels are loading American cargo, soy bean products, two American ships, which employ American seamen and transport the same cargo are laid up across the way from this operation. Now, is that a correct statement?

A. I don't believe they were loading. They are available to load. (Read document indicated by counsel.) No, I can't say there are two Liberian ships, although I see it right here. There's a typographical error in that area, because you have two ships here who could pick up that load. That's what you get for not reading it.

Q. So the two vessels that we refer to then are not Liberian flag vessels, are they?

Mr. Perkel: Which two vessels? Here we have—

Mr. McRight: Excuse me. I'll rephrase it—

Witness: Are you talking about the Aqua Glory?

Q. Yes, sir. You're not saying, are you, that there were two Liberian vessels loading soy beans at the time you made this affidavit? A. No. But that affidavit says it though.

Q. That's a mistake, I think you said. A. It would be pointed out while the two Liberian vessels are preparing American cargo, soy bean products—was the way I remember it.

(122) Q. All right, sir. But my point is—my question is to you, there are and have been no Liberian flag vessels loading soy beans at the Port of Mobile? A. To my knowledge, no.

Q. Now, Mr. Neira, you are familiar with the type flag vessels that call at the Port of Mobile? A. Oh, yes.

Appendix M

Q. What percentage of the vessels that call here at the Port are of foreign flags? A. I would say about 70 to 80 percent.

Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile? A. Within my resources, yes, to picket every one.

Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines? A. We were hoping that they wouldn't do that.

Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true? A. Well, to a point, yes.

Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or from unloading cargo? A. My hope is to clutter up the Port of Mobile with foreign flags—Liberian, Panamanian ships—to bring sufficient pressure on the United States Government to do something about the American merchant marine.

Q. That's your intention? A. Yes, sir.

Q. That's your purpose? A. Yes, sir.

Q. Have you attempted any meetings with representatives of the International Longshoremen's Association within a week prior to the initiation of your picketing? A. No.

Q. You stated in your affidavit that certain other ports have been picketed, Mr. Neira. Do you know if the longshoremen in those ports were (123) working at the time

Appendix M

the pickets were established? A. You say if I know that the longshoremen were working in the particular ports that's in my affidavit—were working when we established picket lines?

Q. Yes, sir. A. No, I don't know.

Q. Do you have any information as to that? A. No, sir.

Mr. Perkel: I would like to report to counsel on that.

The Court: Well, later; but let's finish with Mr. Neira first.

Mr. McRight: Mr. Neira, did you give any thought to putting your picket lines up to publicize your plight after the call-out times of longshore workers?

A. No, sir.

Q. Did you give any thought to taking down your picket line five minutes before and five minutes after the call-out time for longshore labor? A. No, sir.

Q. Couldn't you still accomplish your objective of publicizing the plight of American seamen— A. No, sir.

Q. —by leaving your pickets or not putting your pickets up within ten minutes before and after or five minutes before and after the ILA call-out time?

Mr. Perkel: Now, that, Your Honor, is pure conjecture, of course, on the part of the witness.

The Court: Overruled.

Witness: Why put up picket lines if you're going to knock them down every fifteen minutes? I mean, the purpose of the picket is to let the people

know, and the only way you can do it is with just the type of picketing we're doing. We're fighting for our lives, that's what we're fighting for.

Mr. McRight: All right, sir.

A. While you're fighting for your client, we're fighting for our bread and butter.

Q. Yes, sir. A. And that's the way we're going to do, the best way we know how.

Q. Yes, sir. I understand that, and I make no quarrel with you there, (124) Mr. Neira. The point I'm trying to make is— A. That's true, too.

Q. All right, sir— A. In World War II, only American ships were out there—it was our American seamen dying. Now that the wars are over, there might be American seamen that die on the beach while they take all the gravy and all the profits and all the cargoes out of this country. That's our purpose. We like to live just like anybody else.

Q. Your purpose is what, sir. To publicize, is that what you're saying? A. Exactly. And to live.

Q. In other words, you can't publicize unless you keep people from working? A. Well, you know, I've got a lot of people out of work, too. I sympathize with them, but I've gotta sympathize with my people stronger.

Q. Yes, sir. Why don't you put your pickets at places that don't interfere with the longshoremen?

Mr. Perkel: Your Honor, this shows an incredible ignorance of what a picket line is supposed to do. We admit, we plead, we say for our local unions to be put the most officacious place possible to produce the direct result, to stop the ship if we could,

to get everybody to read the sign—"We do not patronize this vessel"; we meant it.

The Court: All right, now, Mr. Perkel, you are testifying, but you are a visiting lawyer here and we like to extend you every courtesy.

Mr. Perkel: I apologize, Your Honor.

The Court: But we may have to put you under oath, now, if you don't watch out. Mr. McRight, are you about through?

Mr. McRight: Yes, sir, I've got one more question.

The Court: All right.

Mr. McRight: Mr. Neira, do I understand you to say that the object of your picketing is to force members of the Mobile Steamship Association to cease doing business with owners and operators of foreign vessels that call at the Port of Mobile?

A. No, sir.

Q. What is the object of your picketing? A. To get the attention of the American people as to the unfortunate (125) position that a great nation like ours finds itself in, especially in the maritime industry. Here we are yesterday No. 1, today No. 7, and going down every day. Just in Port of Mobile alone 15 ships were sent to China to the boneyard. Over 70% of your American fleet is 20 to 25 years old, and we were just fortunate in 1970 to enact the Merchant Marine Act so that we would get new ships and new blood, but that's not sufficient. We've done other ways. We've cut our crews 7 men off each ship hoping that we can compete with foreigners. They've built auto-

mated ships; they've put them with 16-men crews hoping that would be the answer. But a ship is nothing without cargo. That's all our intentions are. We just want a fair share. Congress says we're entitled to 50%; we're getting 4.8; we would be satisfied with 30, but unfortunately nobody bleeds for the merchant seaman. They think he's still the bum of yesterday; he's not; he's a respectable citizen of this community—married, the father of children and trying to raise them and send them to college, like I did mine. That's all we want.

Q. All right, sir. But you realize that your picketing is keeping members of the Mobile Steamship Association from loading and unloading these vessels that you are picketing, do you not? A. That is not the purpose of our picket line.

Q. No, sir, I didn't ask you the purpose. You realize today that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing? A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association.

Mr. McRight: That's all.

The Court: Mr. Lankford, do you have any cross?

Mr. Lankford: Yes, sir.

Cross-examination by Mr. Lankford:

Q. Mr. Neira, I believe you said Mr. McCartney came in on November 1? A. Yes, sir.

Q. And gave you these pamphlets and posters—gave you a supply of them? A. Yes, sir.

Q. Did he fly in from New Orleans? (126) A. Yes, sir.

Q And he brought all these pamphlets with him? A. Yes, sir.

Q. Didn't he give you any letter of instructions or anything besides this exhibit of instructions? A. No, sir, those were the only instructions.

Q. Nothing else in writing, is that correct? A. That's correct.

Q. Did he give you any money to accomplish these purposes? A. No, sir.

Q. All right, sir. Now, you set your pickets up—you referred to a Wednesday; that's November the 3rd, 1971, is it not, sir? A. That's correct.

Q. That's the day that Judge Hand's order came out, wasn't it? A. I believe it is; I'm not sure.

Q. And you said you got some television publicity, is that right? A. Yes, I think it was on the television—Channel 10 and Channel 5—I wasn't at home.

Q. Channel 10 and Channel 5. Did you get it the day you put your pickets up and the ILA longshoremen wouldn't cross the pickets? A. No. I didn't see the—I was told about the television coverage. I didn't see it so I don't know what was on there.

Q. Were you pleased with— A. They told me that there were men on the picket line carrying our pickets.

Q. Yes, sir. Were you pleased with the television publicity you were getting? A. No, I'm not pleased with nothing like that, but it's unfortunate that's a tool of the trade.

Q. Yes, sir. Do you recall seeing on television the farmers' plight as to how they were going to store their grain when the elevator was full and wouldn't take it? A. No,

because he didn't bleed for the seaman. I didn't hear him say nothing about the poor seaman being out of work. You know to get sympathy you got to show some.

Q. You have no sympathy for the farmer then, do you? A. Oh, yes, I have.

(127) Q. Oh— A. I have a lot of sympathy for the farmer.

Q. Well, did you have sympathy for the farmer when you set your pickets up and delayed the loading of the Bel Hudson for two days, the grain elevator was full, and their grain was out rotting in the fields, Mr. Neira?

Mr. Layden: Judge, that sounded like he's testifying. Now, whether or not he expresses wisdom or sympathy is not an issue.

The Court: Sustained.

Mr. Layden: There's no jury here for him to impress.

The Court: All right. Go ahead, Mr. Lankford.

Mr. Lankford: All right, sir. You picketed the entire State Docks for two days, didn't you?

A. From Wednesday noon until Friday morning.

Q. All right. You had pickets at every conceivable land surface entrance to the Alabama State Docks, didn't you? A. Yes, sir.

Q. And as you first testified, you struck the whole Docks for two days, the first two days?

Mr. Perkel: Objection; the witness hasn't testified he struck anything.

The Court: Sustained.

Mr. Lankford: He may not have intended to, but he did.

Mr. Simon: Judge, counsel have already stipulated to all this. Why is Mr. Lankford going over it again?

The Court: Sustained.

Mr. Lankford: But yet you had every entrance to the State Docks picketed for two days, didn't you—

A. Yes, sir.

Q. —November 3rd and November 4th, is that right? A. That's right.

Q. And this picketing delayed the loading of the Bel Hudson those two days, didn't it, because the ILA wouldn't cross the picket lines, is that correct, Mr. Neira? A. I don't know if it delayed her or not; she's been there since October the 1st, and we just got on the line November the 3rd, so now whether that delayed it or not, I wouldn't know.

(128) Q. Well, you know for a fact, don't you, Mr. Neira, that the ILA longshoremen refused to load the Bel Hudson for two days because of your pickets?

Mr. Perkel: Your Honor, obviously counsel has forgotten. There is a stipulation in the record that vessels carrying grain out of this Port, such as the Bel Hudson and the President Quezon, refrained two days from loading soy beans from Alabama State Docks because individual members of the ILA refused to cross the picket line.

The Court: I believe that is repetitious, Mr. Lankford.

Mr. Lankford: All right, sir—

Mr. Perkel: Obviously.

Mr. Lankford: Mr. Neira, to your knowledge, does the SIU have any labor dispute or labor grievance with the farmers of Mobile County?

Mr. Perkel: Objection, Your Honor; that is a term of art, and if he wishes to use it, a labor dispute and a labor grievance is one thing under the National Labor Relations Act; it's one thing under your State law (unintelligible). I would suggest that if he would define the problem, we might be able to answer the question.

The Court: Sustain the objection.

Mr. Lankford: Does the SIU to your knowledge have any kind of labor agreement—working agreement with any of the soy bean farmers in Mobile County?

A. Not to my knowledge.

Q. All right. Do any of the other Unions have any such agreement relating to time of work, hours of work, or any kind of working— A. I cannot speak for the other Unions because I don't know.

Q. Well, excuse me. I thought you testified to these other Union agreements just a minute ago, Mr. Neira— A. Oh, you're talking about the NMU, the Masters, Mates and Pilots, and those in that—

Q. Yes. A. To my knowledge they have no contract with the soy bean farmers.

Q. They don't have any contract with them, do they? A. Not that I know of.

Q. They don't have any labor disputes that you know of—

Mr. Perkel: Objection Your Honor—

Mr. Lankford: Let me finish, please.

(129) The Court: Let him finish—but he objects to the term "labor dispute", Mr. Lankford; he says it doesn't have a specific meaning to it; and I've already ruled that it was objectionable.

Mr. Lankford: All right. Do you to your knowledge, or any of the Unions who are respondents in this cause have any kind of dispute or disagreement relative to working conditions or wages with any soy bean farmer in Mobile County, Alabama?

A. Oh, I can't answer that because I don't know who picks his peas or how much he pays them; I don't have any knowledge of that.

Q. You know of no such dispute or disagreement, do you, Mr. Neira? A. No, I don't.

Q. And certainly the SIU doesn't have any dispute or disagreement— A. We've got peapickers but they don't pick beans, you know.

Q. SIU has no disagreement or dispute with them, do they, Mr. Neira? A. No, sir.

Q. All right. The AQUA GLORY—did I understand your testimony that she was ready to take a cargo of soy beans? A. No, sir. She has, I understand, about 2,000 tons of cargo left in her.

Q. That cannot be discharged? A. I don't know.

Q. Well, let's put that in another way. How long have you been picketing the AQUA GLORY, Mr. Neira? A. Since November the 3rd about 12:00 o'clock.

Appendix M

Q. You had your pickets down there from what hours to what hours from those days forward? A. Well, on the first day we went from 12:00 noon to 12:00 midnight; the following day we went from 6:00 o'clock in the morning until midnight; and we've been continuing on that schedule.

Q. And have you been at the side of the AQUA GLORY and seen your pickets there during this time? A. I have.

Q. Have you observed ILA longshoremen reporting to work on the AQUA GLORY and refusing to cross your picket lines? A. No, I have not.

Q. You've never seen this happen, is that correct; is that your testimony? (130) A. That's right.

Q. But you know and your understanding is that they have refused to discharge those few remaining tons of ore from that vessel, the Aqua Glory, because of your picket line, haven't they, Mr. Neira? A. Yes, I do know that.

Q. And you intend to keep it that way unless you are ordered to do otherwise, don't you? A. Unless I'm ordered to do otherwise, I'll keep it there forever.

Q. All right, sir. Are any of your pickets members of the SIU? A. Any of my pickets?

Q. Yes, sir. A. Oh, yes.

Q. Are they all members of the SIU? A. There are pickets at the coal tipple who are members of the Seafarers International Union.

Q. Yes, sir. Are any of them members of the NMU? A. Yes.

Q. Of the Radio Operators? A. No, there's none on, Radio Operators, at the present.

Q. Masters, Mates and Pilots? A. Yes.

Appendix M

Q. You do have some pickets from the Masters, Mates and Pilots? A. Oh, yes, sir.

Q. MEBA? A. MEBA, District 1.

Q. Did you have any of your pickets on three months paid vacation while they were picketing? A. I don't understand that question.

Q. Did you have any of your men who were on their three months vacation which had already been paid them while they were picketing the Alabama State Docks?

Mr Perkel: Your Honor, "your men" is kind of an ambiguous term here. There's the ROU, ROA, MEBA, SIU and NMU; which is "our men"?

The Court: Clarify it, Mr. Lankford.

Mr. Lankford: I understood the gentleman testified for all of them. Did you have any of your pickets, members of the NMU or SIU, your pickets, since you apparently are directing this, who were on their paid (131) vacation period while they were picketing?

Mr. Perkel: I would suggest that that question be put as a simple question: What is it he's directing?

The Court: Overruled.

Mr. Lankford: Do you remember the question?

A. Am I directing this strike?

Q. No, sir. That was your own lawyer's suggestion. Do you want the Reporter to read the question back to you, please? A. Please do.

Court Reporter: "Did you have any of your pickets, members of the NMU or SIU, your pickets,

since you apparently are directing this, who were on their paid vacation period while they were picketing?"

Mr. Perkel: I would also like to rise now and object on the ground of irrelevancy.

The Court: I think it's irrelevant whether the gentlemen were being paid or not; sustain the objection.

Mr. Lankford: All right, sir. Mr. Neira, you say you observed your picket lines at the AQUA GLORY. Were they situated so that Exhibit A-1 would be shown to the crew of the vessel who were still aboard her?

A. Oh, yes, I'm sure it would.

Q. You got as close to the side of the vessel as you could, didn't you? A. No, we stayed away from it because it's a nasty place over there—

Q. At the tipple? You didn't want to get dirty? A. Right. We don't want our pickets to get dirty, so we put them down about a hundred feet from the vessel.

Q. But the crew from the AQUA GLORY that you all didn't want to get dirty would pass by your signs? A. Oh, yeah, coming and going.

Q. Right. And you wanted them to see your signs, didn't you? A. Well, that's what we were there for.

Q. Right. And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you? A. That would be nice.

Q. Isn't that one of your purposes, Mr. Neira? (132) A. No, sir, that is not our purpose. Our purpose is to help

ourselves, the American seaman. That's the guy we're interested in, the guy we've got to feed, but if he can benefit out of that, that's fine. But we are interested in the American sailor.

Q. All right, sir. But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seamen, that's what you want, isn't it, Mr. Neira? A. Yes, sir.

Mr. Layden: Judge, he has already answered that. He's gone into that.

The Court: His answer was yes that it was.

Mr. Lankford: All right, sir. And so part of your object in this is to cause friction between seamen on foreign flag vessels and their owners to the point that those owners will raise their wages, isn't that true, Mr. Neira?

A. No, it is not.

Q. Sir? A. No, sir, it's not.

Q. But if a man has to pass these signs back and forth several times a day, he's going to get some message, isn't he?

Mr. Perkel: I request that he stop arguing with the witness, please.

The Court: Sustain the objection.

Mr. Simon: And he's leading him, too, Judge.

Mr. Lankford: Mr. Neira, you are not going to let them clean out those remaining 3,000 tons on the AQUA GLORY so that she can be cleaned and shifted to the Alabama State Docks grain elevator—

(Mr. Perkel stood.)

Mr. Lankford: Let me finish my question, may I?

The Court? All right, go ahead; let him finish.

Mr. Lankford: You are not going to let the AQUA GLORY be discharged of a few—3,000 tons of cargo and then be shifted a couple of berths south and be put under the Alabama State Docks grain elevator to receive a cargo of grain, no matter how desperately the farmers need the storage space in the grain elevator at the Alabama State Docks, are you?

(133) A. No, because I would rather shift it—

Mr. Perkel: Just a moment, Mr. Neira. The first objection is that it's totally argumentative—

The Court: Sustained.

Mr. Perkel: It's impertinent.

The Court: Sustained.

Mr. Lankford: Mr. Neira, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry cargo of grain, aren't you?

A. Yes.

Q. All right. And you don't want the AQUA GLORY to receive any cargo of grain in the Port of Mobile, do you? A. I don't want her to receive no kind of cargo, not just grain.

Q. But the Port of Mobile is your bailiwick and that's the one you're particularly interested in, isn't it? A. Well,

that's true, too, yes; but I also have to look to the rest of the country as part of our bailiwick, also.

Q. Right. And if the farmers get hurt, then that's just tough, isn't it?

Mr. Perkel: Your Honor—

The Court: Sustain the objection. That's argumentative, Alec.

Mr. Perkel: Your Honor, I would appreciate—maybe I am getting a little tired of rising up and down for argumentative questions; I object and request that counsel be cautioned.

The Court: I wish you would just confine it to a factual situation; it's so much more impressive.

Mr. Lankford: All right, sir. That's all.

The Court: All right. Any redirect?

Mr. Perkel: Yes, Your Honor.

Redirect examination by Mr. Perkel:

Q. Mr. Neira, is your authority in this picketing situation limited in any way?

Mr. Lankford: Object to the form of the question; leading, suggestive, calls for a conclusion.

The Court: Overruled.

(134) Mr. Lankford: We except.

Witness: Yes, it is.

Mr. Perkel: Can you tell us what your authority is in this strike, as you have described your picketing?

A. As the official of the Seafarers International Union, in conjunction with the officers of the other Unions, of

which Mr. Chuck Malloy is the coordinator, to receive our instructions, and information comes through Mr. Malloy who acts as the coordinator for this particular situation we've got here in Mobile.

Q. You received this set of instructions, now Respondents' Exhibit E. Have you the power to vary or alter any of those instructions on there?

Mr. Lankford: Same objection.

The Court: Overruled.

Witness: I have not. No. 7 of these instructions specifically states, "No one has authority to change these instructions except upon specific written authority from your Headquarters."

Mr. Perkel: Have you ever received any authority in writing other than that which you hold in your hand?

A. No, sir, I have not.

Mr. Perkel: No further questions.

The Court: Mr. McRight?

Recross-examination by Mr. McRight:

Q. Mr. Neira, you call the shots in the—in Mobile insofar as SIU is concerned, don't you? A. I am the Administrator in charge of the Port of Mobile as far as its policies are carried out.

Q. So far as day to day operation of the Port and as far as SIU is concerned, are you in charge of and responsible for that organizing? A. Yes, sir, I am.

Q. All right. And this applies to the pickets, as well as other items that the SIU is involved in? A. Only when

I get different instructions; then I go by whatever instructions I'm given.

Q. Well, as to the Port of Mobile though, you call the shots as far as SIU pickets are concerned, don't you? A. I don't quite understand your question. You say, "You call the (135) shots about the picket line—"

Q. Yes, sir. A. What are you getting at?

Q. Well, the pickets— A. Are we talking about this beef, or—

Q. Yes, sir, this beef. A. Well, I've already answered the question. I haven't got the authority other than I put pickets out on the picket lines in cooperation and in conjuction with the people that work with me.

Q. You gave them instructions? A. Right.

Q. And you gave them instructions? A. Yes.

Q. Now, when you told your pickets to ask people not to patronize these ships—

Mr. Perkel: Objection; the testimony is to the contrary, Your Honor. He testified that pickets did not speak to anyone.

The Court: Sustained. Your question is hypothecated on a fact that I believe is not in evidence.

Mr. McRight: All right. You asked your pickets, did you not, to carry a sign that said "Please do not patronize this vessel"?

A. I instructed my pickets to speak to no one, carry the picket sign, and hand out leaflets when asked a question.

Q. All right, sir. Now, when you told these pickets to carry this sign that said "Don't patronize this vessel"—

Appendix M

"Please do not patronize this vessel"— A. Oh, yes, very polite.

Q. —what did you mean by patronize? A. The only sense that I can understand "patronize," don't do nothing for it.

Q. Don't do any business? A. Don't do nothing.

Q. Don't do any business? A. That's right.

Q. All right. Now, do your pickets give this message to longshoremen? A. I don't know because I don't know if they read the picket sign because their instructions are not to speak to no one.

(136) Q. Well, you hope the longshoremen read the picket signs, don't you? A. I hope everybody does.

Q. Yes, sir. Including longshoremen? A. Including longshoremen. Including Mobile Steamship Association.

Q. Did you ask the longshoremen not to do business— A. I did not—

Mr. Perkel: Objection, Your Honor—

The Court: That's repetitious; sustain the objection.

Mr. McRight: That's all.

The Court: Mr. Lankford, do you have anything?

Mr. Lankford: No, sir.

The Court: You may step down, Mr. Neira.

(Witness left the stand.)

• • •

Appendix M

(137) November 11, 1971

(Whereupon, the Court reconvened at 11:00 o'clock, A.M.; attorneys representing the respective parties being present, with Mr. Wood appearing for Messrs. Simon and Perkel; and the following proceedings were had and done:)

The Court: Mr. Register, Mrs. Reporter, the Court is prepared to enter an Order overruling the Demurrer. The Court is prepared to let the Temporary Injunction prayed for be issued to the Complainant upon his posting good and sufficient bond in the amount of, I would think, Five Thousand Dollars ($5,000.00). Do you have any feelings on that at all, Mr. Wood?

Mr. Wood: No, Your Honor.

The Court: Mr. Intervenor, what is the status of your Petition now that the Court has issued a Temporary Injunction on behalf of the Complainant? If the Court enters an Order in your case, I am required to have a bond posted.

Mr. Lankford: I understand that a joint bond has been posted. We are prepared to post a separate bond, if the Court will require it. If Mr. Wood is satisfied with the joint bond which I understand Mr. McRight has or can get, then we would prefer, of course, to go along those lines. It's all up to Mr. Wood and the Court, really.

The Court: All right. I'm going to do this then; on the Petition for Intervention, I'm going to let the Temporary Injunction issue as prayed for in the Petition of Intervention upon Intervenor's joining in the Complainant's bond. Is that sufficient?

Mr. Lankford: Yes, sir. Thank you. I appreciate it.

The Court: All right. Mr. Register, if you will enter those Orders, the Court is prepared to sign those orders; and with that we will be in recess. Thank you.

(Whereupon, the Court adjourned.)

Supreme Court, U. S.
FILED
JAN 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION IN OPPOSITION

Frank McRight
Kirk C. Shaw
1101 Merchants National Bank Building
Mobile, Alabama 36602
Attorneys for
Mobile Steamship Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Denying the Writ	10
Argument	11
Conclusion	17
Certificate of Counsel	18

TABLE OF AUTHORITIES

Cases:

American Radio Association, AFL-CIO v. Mobile Steamship Association, Inc., 279 So.2d 467, 474-75 (1973) 9

Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943) 13

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 11

Hughes v. Superior Court of California, 339 U.S. 460 (1950) 11

International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950) 11

TABLE OF AUTHORITIES (Continued)

Page

International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957) 11

Pennington v. Birmingham Baseball Club, 277 Ala. 336, 170 So.2d 410 (1964) 13

Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908) .. 13

Windward Shipping (London) Limited v. American Radio Association, AFL-CIO, 482 S.W. 2d 675, cert. granted, No. 72-1061 ..... 10, 14, 15

Other Authorities:

Labor Management Relations Act, 29 U.S.C. §§141-187 ..... 2, 3

Ala. Code, Tit. 7, §1057 (1940) (Recomp. 1958) 9

Ala. Code, Tit. 14 §54 (1940) (Recomp. 1958) .. 3, 13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is reported at 279 So.2d 467, and is set forth in petitioners' Appendix C.

The denial by the Supreme Court of Alabama of petitioners' application for rehearing, which is dated July

5, 1973, and which was entered without opinion, is set forth in petitioners' Appendix D.

The order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth in petitioners' Appendix E.

JURISDICTION

The basis of the Court's jurisdiction is adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the state court erred in concluding that it had jurisdiction to enjoin picketing by petitioners, American unions in a dispute with foreign-owned, foreign-flag ships manned by foreign crews represented by foreign unions, where the state court concluded that the picketing by petitioners had as a purpose the interference with the businesses of neutral third parties in violation of state policy.

2. Whether the state court, upon finding that the picketing by petitioners was counter to state policy in a domain open to state regulation, violated petitioners' First and Fourteenth Amendment rights by granting a temporary injunction restraining said picketing.

STATUTES INVOLVED

Respondents contend that the jurisdictional scope of the Labor Management Relations Act, as amended,

29 U.S.C. §§141-187, does not extend to the conduct of parties to disputes which relate to the internal affairs of foreign ships. This question cannot be answered by reference to any particular section of the Act.

The policy of the State of Alabama against wrongful interference in the business of another is reflected, in part, by statute, viz:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporations, or associations of persons from carrying on any lawful business, shall be guilty of a misdemeanor." Ala. Code, Tit. 14, §54 (1940) (Recomp. 1958).

STATEMENT OF THE CASE

The petitioners' description of the factual background presented to the Mobile County Circuit Court is conspicuously incomplete in several respects. In particular, there is a complete failure to detail the evidence presented as to the (1) *purpose* and (2) *consequence* of the picketing activites enjoined by the state court. We will attempt here to complete the factual picture presented to the Circuit Court of Mobile County on which its order granting preliminary injunctive relief was based.

On November 3, petitioners established a picket line at the Alabama State Dock gates (69a)* and maintained such pickets at "every conceivable land surface entrance to the Alabama State Docks" (133a) until November 5, the day this injunction suit was filed. The picketing was conducted by American seamen's unions, and the dispute, as evidenced by the picket signs, related to the alleged substandard wages of the foreign crews on foreign ships.

Although the situs of petitioners' picketing was subsequently shifted to the berths of two foreign-flag vessels, petitioners had instructions to picket all foreign vessels in the Port (126a) according to their only witness, Mr. Louis Neira, Port Agent of Seafarers International Union. He also testified that 70-80% of the vessels that call at the Port of Mobile are foreign flag (126a).

At the time petitioners began their picketing, farmers in the southern United States were harvesting their soybean crop, much of which was to be exported for sale overseas. An estimated 13,000,000 bushels of soybeans, valued in excess of $50,000,000 (74a), were in the fields of this state and in the elevators at the Alabama State Docks, waiting to be shipped through the Port of Mobile (74a). Soybeans must be harvested when ripe, otherwise they will be lost. The elevators at the Alabama State Docks and other storage facilities can accommodate only a small amount of the annual

*Unless otherwise noted, all citations are to the Appendix to Petition for a Writ of Certiorari to the Supreme Court of Alabama, filed by petitioners.

crop so there must be a continuous flow through the Docks' facilities into ships for carriage.

Petitioners' pickets brought an immediate halt to the loading and discharging of ships at the Port (61a-75a). As expected, longshoremen refused to cross petitioners' picket lines to load or discharge vessels (*ibid*). Thus, millions of bushels of soybeans were in danger of being lost through spoilage.

Additionally, member companies of the Mobile Steamship Association were losing in excess of $15,000 per day in fixed overhead costs while the picketing continued (73a). Vessel demurrage costs ranging from $2,000 to $5,000 per day per vessel were forfeited (73a). Ocean freight revenues were lost at the rate of $35,000 per vessel per day (74a).

Other facets of the Mobile economy were affected by the picketing in the Port. The Mobile economy loses in excess of $3,300,000 per week from a work stoppage in the Port (74a). Thus, the work stoppage caused by petitioners had an immediate, significant impact on the economy of Mobile and its neighboring communities. Other forms of transportation, such as rail, barge and truck lines, which would have normally been busy moving cargo in and out of the Port were idled with resultant losses (74a). Manufacturers dependent upon raw materials flowing through the Port were slowed in their production (74a).

In addition to the dock workers who did not cross the picket lines, a large number of other employees

directly connected with the industry had to be furloughed or laid off because of lack of work due to the picketing (74a). The docks facilities of the State of Alabama which consist of all of the public wharves in the Port of Mobile valued in excess of $50,000,000, were largely idled by the picketing (74a).

The effect of petitioners' picketing in the Port of Mobile, if it had been allowed to continue, would have been disastrous in terms of the economic interests of Mobile and the area's farmers, which stood to lose incalculable sums of money and business because of petitioners' ability to close the Port with its pickets.

Although the unions claim that their picketing was purely for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign vessels, the testimony of the unions' only witness, Louis Neira, belied that claim and revealed that the unions had other motives. Mr. Neira testified on cross-examination, as follows (125a):

"Q. Now Mr. Neira, are you familiar with the type flag vessels that call at the Port of Mobile?
A. Oh, yes.
Q. What percentage of the vessels that call here at the Port are of foreign flags?
A. I would say about 70 to 80 percent.
Q. Yes, sir. And it's your instructions from your International Headquarters to picket

70 or 80 percent of the vessels that call at the Port of Mobile?
A. Within my resources, yes, to picket every one.
Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines?
A. We were hoping that they wouldn't do that.
Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?
A. Well, to a point, yes.
Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?
A. My hope is to clutter up the Port of Mobile with foreign ships — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American merchant marine.
Q. That is your intention?
A. Yes, sir.
Q. That is your purpose?
A. Yes, sir."

(130a)

"Q. ... You realize that your picketing is preventing members of the Association from

loading and unloading these vessels that you are picketing?

A. I hope that my picket line will shut the whole State Docks down and let everybody go home for awhile. I hope I can do that. Not just the Mobile Steamship Association."

(143a-44a)

"Q. All right, sir. Now, when you told these pickets to carry this sign that said 'don't patronize this vessel' — 'Please do not patronize this vessel' —

A. Oh, yes, very polite.

Q. What did you mean by patronize?

A. The only sense that I can understand 'patronize', don't do nothing for it.

Q. Don't do any business?

A. That's right.

Q. Well, you hope the longshoremen read the picket signs, don't you?

A. I hope everybody does.

Q. Yes sir. Including longshoremen?

A. Including longshoremen. Including Mobile Steamship Association."

(140a)

"Q. Mr. Neira, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain (soybeans), aren't you?

A. Yes."

After the Circuit Court of Mobile County entered its temporary injunctive order restraining the petitioners' picketing, petitioners filed an appeal to the Supreme Court of Alabama, which could have been expedited pursuant to Alabama law. Ala. Code, Tit. 7, §1057 (1940) (Recomp. 1958). Instead of expediting their appeal, however, petitioners delayed its hearing for over a year by requesting and obtaining eight extensions of time for the filing of the transcript and their brief.

While the petitioners' appeal to the Alabama Supreme Court was pending, they filed a separate action in the United States District Court for the Southern District of Alabama seeking to enjoin further state court proceedings. After the district court refused to grant a preliminary injunction of the state court proceedings, the petitioners appealed to the Fifth Circuit Court of Appeals, which affirmed, holding that the court below had not abused its discretion in refusing the requested preliminary relief. *American Radio Association v. Mobile Steamship Association*, 483 F.2d 1 (5th Cir. 1973).

Petitioners' appeal to the Supreme Court of Alabama, notice of which was filed on November 22, 1971, was finally argued to that Court on February 13, 1973. The Supreme Court of Alabama affirmed the lower court's decision and petitioners' application for rehearing was denied on July 5, 1973.

REASONS FOR DENYING THE WRIT

The petition presents two issues for review by the Court. The threshold issue, whether the state court's jurisdiction to adjudicate the matter is preempted by the Labor Management Relations Act, as amended, is now before the Court in *Windward Shipping (London) Limited v. American Radio Association*, case no. 72-1061. That case was orally argued to the Court on December 3, 1973, and comprehensive briefs setting forth why the state court's jurisdiction is not peeempted in this factual setting have been filed.* The Court's disposition of the preemption issue in *Windward* will determine that issue in the case at bar.

As to the second issue raised by the petition, that dealing with whether the picketing was constitutionally protected free speech, the Supreme Court of Alabama correctly decided that picketing of the sort conducted in this case which has the intended and actual effect of causing organized labor not to cross the picket lines and not to perform services for the ships being picketed and which, according to the testimony of the union witness, was intended to "clutter up the Port of Mobile with foreign ships" and "to shut the whole State Docks down and let everyone go home for awhile" is something more than pure speech and is subject to regulation. Assuming, as we urge, that there was no preemption because the dispute related to the internal affairs of foreign ships, ie. the alleged sub-

*This respondent appeared and with the consent of the parties filed a brief as *amicus curiae* in *Windward*.

standard wages of the foreign crews, its holding that petitioners' picketing could be temporarily restrained, pending a full hearing on the permanent injunction, was proper and raises no questions which call for review by this Court. This is particularly true as the relief granted by the Alabama Court was merely temporary injunctive relief pendente lite and was not a final determination on the merits.

ARGUMENT

This Court has repeatedly held, and the petitioners acknowledge in their brief, that picketing, even though peaceful, may be permissibly restrained by a state court when it is "counter to valid state policy in a domain open to state regulation."* *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284 (1957). *Accord, Hughes v. Superior Court of California*, 339 U.S. 470 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). The Supreme Court of Alabama carefully reviewed the evidence presented to the Circuit Court of Mobile County and concluded on the application for interim relief that there was sufficient evidence to raise a substantial question as to whether petitioners' picketing was contrary to the policies and interests of Alabama and that the trial court did not abuse its discretion in deciding to grant a temporary injunction to maintain the status

*Since the reasons that the case at bar is "in a domain open to state regulation" have been thoroughly briefed and argued to the Court in *Windward*, they will not be reargued here.

quo until a full hearing could be had on the merits of the case. The Alabama court expressed its inquiry on appeal in the following terms:

> "We must decide whether the trial judge abused his discretion by concluding that there was wrongful interference with Appellees' business warranting his issuance of the temporary writ."

The court concluded:

> "The dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of those vessels, or one where the intent was to block the use of those ships . . . ."

The court went on to review the testimony of the union witness as to the goals of the unions and concluded that appellees had standing to sue under Alabama law because:

> "We think there was evidence sufficient to support a finding that the action of the unions was in part with the goal of interfering with the business of the appellees in their shipping and farming operations."

The decision of the Supreme Court of Alabama in the case at bar is in accord with the long-standing policy of Alabama and other states that a person or firm shall be permitted to conduct its business without

wrongful interference from others. That policy in Alabama is expressed in both the state's criminal statutes [Ala. Code, Tit. 14, §54 (1940) (Recomp. 1958)] and its case law. See *Pennington v. Birmingham Baseball Club*, 277 Ala. 336, 170 So.2d 410 (1964); *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332 (1908). As the Supreme Court of Alabama stated in its opinion in the case *sub judice*:

> "The right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected if necessary, by injunctive process." 279 So.2d at 475, quoting *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383 (1943).

Petitioners contend that the Alabama courts were limited in their inquiry as to the purposes of petitioners' picketing to the language on petitioners' placards and the leaflets which their pickets distributed. There was other evidence, however, which established the true purposes of the picketing and the Alabama courts quite properly examined all of the evidence in considering whether the trial court had abused its discretion in granting a temporary injunction. Since the petitioners chose to present only one witness at the hearing, it is understandable that the Supreme Court of Alabama gave considerable emphasis to his testimony in its opinion. The unions' witness, Louis Neira, Port Agent for the Seamen's International Union,

who was speaking for "all the Maritime Unions"* that were picketing, admitted on cross-examination:

> "A. My hope is to clutter up the Port of Mobile with foreign flags — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American merchant marine.
> Q. That's your intention?
> A. Yes, sir.
> Q. That's your purpose?
> A. Yes, sir.
> * * *
> "A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association."**

*Mr. Neira was instructed at the outset of cross-examination: ". . . when I say 'your', by that I mean all the Maritime Unions that are in fact picketing . . ." (115a)

**The testimony that one of petitioners' purposes in picketing was to close the Port of Mobile to foreign shipping contradicts the optimistic statement of the Solicitor General in the Supplemental Memorandum of the United States as *Amicus Curiae* in *Windward*. There, in discussing the power of the petitioner unions over American shipping should their picketing be deemed protected by the Labor Management Relations Act, the Solicitor General observed:

> "The campaign undertaken by the . . . unions — if protected — could effectively close our ports to foreign-flag vessels. Close to 95 percent, by tonnage (and 81 percent, by value), of our waterborne foreign trade is carried on foreign-flag vessels (Preliminary Census Figures, 1972). Manifestly any significant interruption of foreign-flag service carrying United States cargo would have substantial economic consequences, not only upon shipowners, but also upon American exporters and importers and their employees, as well as those employed at our ports.
> "We do not suggest that the . . . unions have any purpose other than a legitimate interest in protecting their own members' job opportunities, and *we would not expect that picketing* — even if protected — *would be used to close American ports entirely to foreign vessels.*
> * * *
> "If this picketing is held to be protected by the National Labor Relations Act, the . . . unions will be accorded the *power* substantially to affect our trade with the rest of the world and our international relations." Supplemental Memorandum of the United States As *Amicus Curiae* at 15, 16, *Windward Shipping (London) Limited v. American Radio Association, AFL-CIO*, No. 72-1061 (emphasis added in part).

The court noted that picketing of the sort involved in this case which had the intended and expected effect of causing organized labor to refrain from crossing the picket line and to refrain from loading and unloading the picketed ships is something more than communication by pure speech and thus is subject to regulation. As the dispute was rightly found to be beyond the scope of the NLRA, regulation by the state is not precluded. The Alabama Supreme Court held that because the dispute endangered the business activities of a large segment of the area's population it was neither illegal nor improper for the trial court to take jurisdiction and deal temporarily with the subject matter. This was, we submit, neither unconstitutional nor unreasonable.

It must be emphasized that the Alabama trial court was concerned merely with an application for interim

relief, and the Alabama Supreme Court was concerned with whether the trial court abused its discretion in granting such relief pending a final determination on the merits.

Clearly, picketing by American seamen's unions which sought to force foreign ships with foreign crews represented by foreign unions to raise the wage level to American standards or to prevent such ships from loading and unloading cargo in the Port of Mobile because the wages of the crews are less than those paid on American ships, and which had an intended effect of "cluttering the Port of Mobile with foreign ships" and "closing down the State Docks" and in so doing to cause untold hardship to farming and other local interests in Alabama by interfering with the carrying on of their lawful business activities might well be contrary to a valid public policy of the State of Alabama. As testified by the union witness, 70 to 80% of the ships which call at Mobile to pick up export cargo and to leave off import cargo are, in fact, foreign ships.

Understandably, the petitioners seek to characterize Mr. Neira's testimony as a "personal" expression of "hope" (Petition, pp. 18-19). In doing so, however, they would have the Court overlook the fact that Mr. Neira was not a mere union member but rather the Port Agent for the SIU in the Port of Mobile; he was the *only* witness the unions called to explain what they were seeking to accomplish; and, finally, his explanation of the purpose of picketing was not just his personal explanation but that of "all of the Maritime Unions" that were picketing (115a). Moreover, trial

counsel for petitioners stipulated in open court that the object of the picketing was to cause a cessation of business with the ships picketed.*

In summary, the Supreme Court of Alabama affirmed the granting of interim injunctive relief only after it determined that there were important state policies and interests involved and that it was not an abuse of the trial court's discretion to maintain the status quo pending a final determination. The opinion is consistent with the directives of this Court in *Vogt, Hughes, Hanke* and *Giboney, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Frank McRight
Kirk C. Shaw
Counsel for Respondent
Mobile Steamship
Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

*Counsel for respondents stated at the outset of the state court hearing: "[w]e have no wish to say that our object is not to cause people not to do business with those ships . . ." (60a).

CERTIFICATE OF SERVICE

I, Frank McRight, one of the attorneys for Respondent Mobile Steamship Association herein, do hereby certify that on this ____ day of January, 1974, three copies of the foregoing brief in opposition to the petition for writ of certiorari have been served on each of the following attorneys of record:

Howard Schulman, Esq.
Schulman, Abarbanel and Schlesinger
1250 Broadway
New York, New York 10001
and
Otto E. Simon, Esq.
Simon and Wood
1010 Van Antwerp Building
Mobile, Alabama 36602
Attorneys for Petitioners

Alex F. Lankford, Esq.
Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601
Attorneys for Respondent Robert E. Malone

by mailing the same to them through the United States Postal Service, postage prepaid.

_____

Frank McRight

Supreme Court, U. S.
FILED
JAN 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT ROBERT E. MALONE IN OPPOSITION

Alan F. Lankford, III
3060 First National Bank Building
Mobile, Alabama 36602
Attorney for Robert E. Malone

OF COUNSEL:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Mobile, Alabama

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Denying the Writ	14
Argument	14
Conclusion	20
Certificate of Counsel	21

TABLE OF AUTHORITIES

CASES

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)	16, 17
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	15
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1948)	17
Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963)	15
International Longshoremen's Association v. Ariadne Shipping Co., Ltd., 397 U.S. 195 (1970)	15
International Union, U.A.W. v. Russell, 264 Ala. 456, 88 So.2d 175 (1956), aff'd 356 U.S. 634 (1958)	19

TABLE OF AUTHORITIES (Continued)

Page

Klibanoff v. Tri-Cities Retail Clerks' Union, 258 Ala. 479, 64 So.2d 393 (1953) 19

McCulloch v. Sociedad Nacional de Marineros, etc., 372 U.S. 24 (1963) 15

Marine Cooks and Stewards Union v. Panama S.S. Co., 362 U.S. 365 (1960) 15

Pennington v. Birmingham Baseball Club, Inc., 277 Ala. 336, 170 So.2d 410 (1964) 19

Pike v. Southern Bell, 263 Ala. 59, 81 So.2d 254 17

Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908) .. 18

Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957) 16, 17, 19

Constitution & Statutes

Labor Management Relations Act, 29 U.S.C. §§ 141-187 2

Alabama Constitution, Article 1, Section 6 ..... 4, 17

Title 7, Section 1057 Code of Alabama (Recomp. 1958) 14

Title 14, Section 54 Code of Alabama (Recomp. 1958) 3, 18

Title 14, Section 57 Code of Alabama (Recomp. 1958) 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT ROBERT E. MALONE IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is reported at 279 So.2d 467, and is set forth in petitioners' Appendix C. The denial by the Supreme Court of Alabama of petitioners' application for rehearing, dated July 5, 1973, and which was entered without opinion, is set forth in petitioners' Appendix D.

The order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth in petitioners' Appendix E.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTIONS PRESENTED

1. Whether the state court was correct in concluding that it had jurisdiction to enjoin picketing by petitioners, American unions in a labor dispute with foreign-owned, foreign-flag ships manned by foreign crews represented by foreign unions, which effectively shut down the Port of Mobile, where the state court concluded that the picketing by petitioners had as one of its purposes the interference with the businesses of neutral third parties in violation of valid state policy.

2. Whether the state court, upon finding that the picketing by petitioners was counter to state policy in a domain open to state regulation, violated petitioners' First and Fourteenth Amendment rights by granting a temporary injunction restraining said picketing which effectively shut down the Port of Mobile.

STATUTES INVOLVED

Respondent contends that the jurisdictional scope of the Labor Management Relations Act, as amended, 29 U.S.C. §§141-187, does not extend to the conduct

of parties to disputes which relate to the internal affairs of foreign ships. This question cannot be answered by reference to any particular section of the Act which literally construed would answer the question.

Respondent further contends that the picketing by petitioners for the purpose of wrongfully interfering with respondent's occupation as a farmer is contrary to a valid policy of the State of Alabama reflected, in part, by statute, viz:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporations, or associations of persons from carrying on any lawful business, shall be guilty of a misdemeanor." Ala. Code, Tit. 14, §54 (1958), p. 60.

> "Any person, firm, corporation, or association of persons who uses force, threats, intimidation, or other unlawful means to prevent any other person, firm, corporation, or association of persons from engaging in any lawful occupation or business shall be guilty of a misdemeanor." Ala. Code, Tit. 14, §54 (1958), p. 61.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent Malone contends that his rights guaranteed him and other farmers in like position under

Article 1, Section 6 of the Constitution of the State of Alabama (relevant part of which is set forth hereinafter) were being violated by petitioners' pickets.

STATEMENT OF THE CASE

Petitioners' brief is so replete with omissions regarding a critical issue — the real intent, purpose and result of the pickets, as to require this respondent to present a Statement of the Case.

This case has as its beginning September 30, 1971, the expiration date of the agreement between one of the petitioners' affiliated unions, the International Longshoremen's Association ("ILA") and the employer bargaining agent, respondent Mobile Steamship Association. On October 1, 1971, the ILA commenced its strike against the Steamship Association, thereby shutting down the Port of Mobile. At the time of the strike, one of the foreign owned vessels in the Port was the BEL HUDSON, which arrived on October 1, 1972, under the elevator spouts at the Alabama State Docks ("Docks") ready to receive a cargo of soybeans (p. 79a). [Unless otherwise noted, all page references shall refer to Petitioners' Appendix to Petition for subject Writ of Certiorari.]

At the time of the ILA strike, soybean farmers had started to harvest their crops of beans to be sold and delivered at the Docks elevator, for export.

Respondent Malone is a soybean farmer in Mobile County (p. 79a). He was not involved in any labor dis-

pute, conflict or disagreement with any of the petitioners, respondent Steamship Association, or anyone else (p. 134-135a). He had to borrow money to rent the land to grow his soybeans (p. 79a), as did other farmers who had to borrow money in order to buy seed and fertilizer for their bean crop (p. 77a).

The public grain elevator at the State Docks in Mobile is the only facility for storing of soybeans in the area (p. 77a, 79a). In addition, there were thousands of other farmers in South Alabama who grew beans, and stood to lose a crop valued at $50,000,000.00, unless the grain elevator at the State Docks could load waiting vessels with cargoes of grain (p. 74a), and thereby make room for more grain to be stored in such elevator. Respondent Malone, together with hundreds of other farmers in South Alabama, had no on-farm storage facilities; and because of the perishable nature of soybeans, they must be harvested when ready, or the entire crop would be lost, due to shattering and falling on the ground, where they cannot be combined and picked up (p. 78a).

Strikes were also called in other Gulf ports by the ILA, but with less success than the efforts in Mobile. In Texas, the ports never stopped operating, as local ILA leaders refused to follow strike orders issued from the ILA International Headquarters in New York. In Louisiana, the National Labor Relations Board ("NLRB") secured an injunction under §10(1) of the National Labor Relations Act, compelling the longshoremen to return to work in the Port of New Or-

leans. At one point the Port of Mobile was the only major port on the Gulf Coast that was not working.

On November 3, 1971, the NLRB initiated efforts to secure a restraining order in the Port of Mobile pursuant to §10(1) of the NLRA. At approximately 12:00 a.m. on November 3, 1971, the Federal District Court in Mobile advised the parties that the temporary restraining order prayed for by the NLRB would issue against all ILA locals in the Port of Mobile (p. 69a).

Almost simultaneously with the Federal Court's decision to enter the temporary restraining order, at about 12:10 p.m. on November 3rd, petitioners established a picket line at all gates of the Alabama State Docks, where vessels were berthed, (p. 69a). These pickets were located at "every conceivable land surface entrance to the Alabama State Docks" until November 5, the day the State Court injunction suit was filed by respondent Steamship Association (testimony of Mr. Niera (p. 132a). On November 3rd, the Port of Mobile had at the Docks the following vessels: ILKON TAK, Liberian Flag, AQUA GLORY, Liberian Flag, BEL HUDSON, English Flag and PRESIDENT QUEZON, Phillipine Flag, (p. 96a). Petitioners' so-called "informational pickets" at all entrances to the Docks were directed against *all* of the vessels in port, as the same are named above (p. 81a), and these vessels were foreign flag vessels. The ILA refused to cross petitioners' picket lines (p. 117a), shutting down the whole port.

On November 5th, when the State Court injunction suit was filed, the situs of this picketing was shifted to the berths of two of such foreign flag vessels, the ILKON TAK and the AQUA GLORY, although the petitioners had instructions to picket *all* foreign vessels in the Port. (Testimony of Mr. Niera, p. 126a). Mr. Niera testified that 70-80% of the vessels that call at the Port of Mobile are foreign flag (p. 126a). These "informational" pickets that were supposed to tell the public of petitioners' plight were placed at the sides of the ILKON TAK and the AQUA GLORY berths at an almost deserted State Docks, far away from the public eye. One of the admitted purposes of doing this was to get the crews of these vessels to see the signs, so as to try and make their owners raise their wages (p. 138-139a). The AQUA GLORY had called at the Port of Mobile 3 times in the 6 months prior to the ILA strike, and none of the petitioners had attempted to picket her, and witness Macpherson further testified that in the past 13 years he had been in the steamship business in Mobile, none of petitioners had ever posted any informational pickets until the then present time (p. 71a).

Longshoremen and other of respondent Steamship Association's employees represented by locals of the ILA refused to cross petitioners' picket lines or to perform work or services incident to the loading and/or discharge of vessels in the Port (pp. 61-75a). Thus, the picketing prevented the Steamship Association and its members from performing its contracts to load and unload the foreign flag vessels picketed and brought to a halt their business operations in the Port.

As a result of the work stoppages induced by the picketing in question, irreparable injuries were being sustained by the respondent Steamship Association, its members and the Port of Mobile. These losses were particularized in the affidavit of J. R. Macpherson (p. 67a). Member companies of the Steamship Association were losing in excess of $15,000.00 per day in fixed overhead costs, including but not limited to salaries of office and supervisory staff and depreciation of equipment. Vessel demurrage costs were ranging from $2,000.00 to $5,000.00 per day per vessel. Ocean freight revenues were being lost at the rate of $35,000.00 per vessel per day. The loss to the economy of the City of Mobile resulting from the work stoppage was estimated to be in excess of $3,300,000.00 per week. Other forms of transportation, such as rail, barge, and truck lines which would have normally moved cargo in or out of the Port area were idled with resulting losses. Inland manufacturing plants were suffering the necessity of curtailing production and laying off personnel, all as a result of the inability of these plants to export their products and/or import raw materials used in the manufacturing process. One Liberian Flag vessel loaded with steel was anchored outside of the Port of Mobile, but would not come in, due to petitioners' shutting the Port down (pp. 84-85a).

In addition to the dock workers directly involved in the work stoppages at the Port, a large number of other employees directly connected with the industry were furloughed or laid off as a result of the strike. The Docks facilities of the State of Alabama which consisted of all of the wharves in the Port of Mobile

with a cost value in excess of $50,000,000.00, were largely idle with resulting losses of revenues. The pickets delayed the shipment of soybeans through the Port of Mobile, and if those shipments had not been commenced and completed, without interruption, it was estimated that the entire crop of approximately 13,000,000 bushels, valued at in excess of $50,000,000.00 would have been lost. Vessels which normally call at the Port of Mobile had been diverted to other ports. As mentioned earlier, other ports on the Gulf Coast were in operation and not under a strike. Cargo that was normally shipped through the Port of Mobile had been and was being diverted to open ports. Additionally, foreign shippers were substituting other world markets for their sales and purchases because of the strike and past experience indicated that when a normal flow of trade is diverted, a large percentage of that diverted would not revert to the Port of Mobile.

The result of the picketing by petitioners, if it had been allowed to continue, would have been disastrous. Millions of dollars worth of soybeans, well past the time they should have been harvested, would have been lost, with resulting loss to the community and to the farmers had the Petitioners been allowed to continue their announced purpose of picketing all foreign vessels in the Port. Although the unions eventually shifted the pickets to foreign flag vessels which were not located at the grain elevator, it was the stated purpose of the picketing to close up the entire Port of Mobile and to stop all foreign flag vessels from operating here (testimony of Mr. Niera (pp. 126-129a)), *and at a time when the only vessels in Port were those*

of foreign flag. Moreover, one of the vessels being picketed (the SS AQUA GLORY) and, thus, being prevented from unloading, was scheduled to load soybeans after her ore cargo was discharged. Mr. Niera admitted that the picketing was designed to prevent that vessel from loading soybeans from the Alabama State Docks Grain Elevator (p. 136a).

Not only were the soybean cargoes in jeopardy, the reputation of the Port and the economic interests of the community and members of the Steamship Association were threatened. Mobile stood to lose incalculable sums of money and business.

The magnitude of the crisis facing the Port of Mobile, and, indeed, the State of Alabama at the time the preliminary injunction was sought and granted is apparent from the transcript of the State Court proceedings.

Although the unions claim that their picketing was purely for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign flag vessels, the following testimony of petitioners' only live witness, Mr. Niera, revealed the true purpose, intent and calculated result of such pickets:

(p. 125a)

"Q. Now Mr. Niera, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh yes.
Q. What percentage of the vessels that call here at the Port are of foreign flags?
A. I would say about 70 to 80 percent.
Q. Yes sir. And it is your instructions from your international headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?
A. Within my resources, yes, to picket everyone.
Q. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good union men would not cross those picket lines?
A. We were hoping that they wouldn't do that.
Q. Yes sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?
A. Well, to a point, yes.
Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?
A. My hope is to clutter up the Port of Mobile with foreign ships — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American Merchant Marine.
Q. That is your intention?
A. Yes sir.

Q. That is your purpose?
A. Yes sir."

(p. 130a)

"Q. ... You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?
A. I hope that my picket line will shut the whole State Docks down and let everybody go home for awhile. I hope I can do that. Not just the Mobile Steamship Association."

(pp. 143-144a)

"Q. Alright sir. Now, when you told these pickets to carry this sign that said 'don't patronize this vessel' —
A. Oh yes very polite.
Q. What did you mean by patronize?
A. The only sense that I can understand 'patronize', don't do nothing for it.
Q. Don't do any business?
A. That's right.
Q. Well you hope the longshoremen read the picket signs, don't you?
A. I hope everybody does.
Q. Yes sir. Including longshoremen?
A. Including longshoremen. Including Mobile Steamship Association."

(p. 140a)

"Q. Mr. Niera, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain (soybeans), aren't you?
A. Yes."

It is perfectly obvious that petitioners' purpose was to shut down the whole Port of Mobile (which they effectually did, until enjoined), so as to give their affiliated ILA union an excuse not to cross their picket lines, to the end that the ILA could have an excuse to disobey a Federal Judge's Order putting them back to work.

The above are the facts that were heard by the Trial Judge in the State Court on the original complaint of respondent Steamship Association, the intervening complaint of respondent Malone, the answer to the original complaint, and the affidavits and testimony of witnesses in open Court. The State Court refused respondents' request for an *ex parte* injunction, and set the matter down for trial after giving petitioners time to prepare their case.

With respect to the State Court injunction order not complained of by petitioners until approximately 1 year after it was issued, if petitioners considered that such order was vague in not being sufficiently precise to advise them of what they did wrong, the record is void of any effort to request more definitive findings. If petitioners considered that they were wrongfully enjoined and were suffering immediate and irreparable damage, it is incomprehensible why they did not immediately use the prompt review (to the

Alabama Supreme Court) provisions of Title 7, §1057 of the Code of Alabama. Instead of seeking prompt redress for any claimed wrongs, the transcript of the State Court proceeding is replete with requests for delays in taking an appeal to the State Supreme Court [7 requests totalling about 1 year to extend time to file a transcript which could not have taken over 2 days to prepare]. Again, the record fails to show any effort by petitioners to request any more definitive opinion from the State Supreme Court.

REASONS FOR DENYING THE WRIT

The evidence before the State Trial Court, and upon review by the State Supreme Court, showed clearly that petitioners' purpose in posting the pickets was not to inform the public, but to meddle in the internal affairs of foreign vessel owners, shut down the entire Port of Mobile, and render void a Mobile Federal Court's back-to-work order. Petitioners' activities were unlawful in scope and purpose, in violation of a valid State policy. The State Supreme Court was correct, and the Writ should be denied.

ARGUMENT

Petitioners contend that a farmer such as respondent Malone, whose crops could not be harvested and would rot in the field, has as his sole forum to determine his rights the NLRB. The posting of pickets beside the only vessels in the Port of Mobile, at isolated berths, inside the gates of the Docks, could only be for the purpose of attempting to organize its crews

and foment discord between such foreign crews and their foreign vessel owners-employers. However, once the Port was shut down by such pickets, the resulting clamor and wide disruption and economic chaos would be such as would reach the National Government level, where pressure would be exerted to alter our Government's international relationship with these foreign vessel owners. Neither of these illegal purposes is a proper activity, and the State Courts have the authority to hear injunctive procedure directed against such activities. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

The cases cited by petitioners, *International Longshoremen's Association v. Ariadne Shipping Co., Ltd.*, 397 U.S. 195 (1970) and *Marine Cooks and Stewards Union v. Panama S.S. Co.*, 362 U.S. 365 (1960) are not applicable to this case. Neither case involved the intent, purpose and result of shutting down an entire Port or crippling the economy of a State. Further in *Ariadne*, the pickets were protesting low wages paid to American longshoremen by their employer, the foreign vessel owner. In *Marine Cooks and Stewards*, the Court simply held that a Federal Court could not issue an injunction, and expressly did not decide whether the picketing was tortious under State or Federal law (at p. 372).

The evidence as to the illegal intent and purpose of the pickets to shut down the entire Port shatters

petitioners' contention with respect to the exclusivity of the NLRB, as well as its remaining contention that such pickets' activities were within the free speech protection of the First Amendment. Petitioners' portrayal of the testimony of Mr. Niera as merely a random expression of a rank-and-file union man is simply not accurate. Mr. Niera was in charge of the pickets in the Port of Mobile, so far as petitioner SIU was concerned (pp. 142-143), and was presented to testify for all petitioners (p. 115a). Were the State Court judges to completely disregard Mr. Niera's testimony as to the purpose of the pickets, together with other testimony that showed this illegal purpose had been fulfilled by shutting down the whole Port? Were the State Courts to ignore the fact that the pickets were ultimately placed in remote areas, far from the public eye? In *International Brotherhood v. Vogt*, 354 U.S. 284 (1957), where pickets were placed upon a rural highway frequented by few people, the Court affirmed a State Court's finding that the purpose of the pickets was illegal. Were the State Courts to also ignore the undisputed fact that the pickets did not appear until within minutes after a Federal Judge had ordered the ILA back to work?

With respect to petitioners' claim of First Amendment protection, the purpose and method of this picketing was unlawful and is not protected by Federal law. Petitioners rely heavily upon *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, which certainly is inapplicable to this case. In *Logan Valley*, only 1 store in a public shopping center was being picketed, and the Court expressly found that the pickets

did not interfere with the public use, not only of the picketed store, but of the rest of the stores in the shopping center. There was neither purpose nor manner found to shut down the entire shopping center. *Logan Valley*, in addition to requiring a lawful manner and purpose to protect First Amendment rights, requires that this picketing be in such a manner as not to unduly interfere with the rights of others to use the picketed facility (at page 613 of Opinion). There is not present in *Logan Valley* or any other case cited by petitioners, a set of facts even resembling petitioners' purpose here, which was also to help an affiliated union defy a return-to-work Court Order.

Petitioners' First Amendment rights are not exclusive and paramount to the constitutional rights of all others. The States have the right to enforce their law to enjoin picketing done in the manner and for the purpose employed by these petitioners, *Teamsters Local 695 v. Vogt, supra; Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1948).

The pertinent part of Section 6 of Article 1 of the Alabama Constitution is, as follows:

> "... and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law ..."

This section applies to civil, as well as criminal law, *Pike v. Southern Bell*, 263 Ala. 59, 81 So. 2d 254.

The case law of Alabama with respect to protecting a man from wrongful interference with his business is expressed in *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332 at page 334:

> "In necessary consequence, an unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies. Holt, C.J., in Keeble v. Hickeringill, 11 East, 574, thus states the doctrine: 'He that hinders another in his trade or livelihood is liable to an action for so hindering him' — though it must be that he intended the broad declaration to be subject to the qualification that the hindrance, the act or conduct so resulting, be wrongful, unlawful, and this, *independent, as a general rule, of the motive or intent with which the hindrance was accomplished*. Id., 47 So. at 334." (Emphasis supplied)

Clearly this respondent's rights under Section 6 of the State Constitution were being violated.

With respect to Title 14, Section 54 of the State Code, the evidence was clear that not only was there a combination or conspiracy among petitioners' own "committee" to unlawfully prevent Malone from making a living farming, such combination and conspiracy spread into petitioners' affiliated union, the ILA.

The purpose of petitioners' activity clearly constituted unlawful means of depriving Malone of his right

to make a living in violation of Title 14, Section 57, *International Union v. Russell*, 246 Ala. 456, 88 So. 2d 175; *Klibanoff v. Tri-Cities Retail Clerks' Union*, 258 Ala. 479, 64 So.2d 393 (1953).

It is uncontroverted that respondent Malone had no quarrel with anyone — he just wanted to harvest the crop of beans he had planted, and petitioners' pickets were preventing there being any room at the only available elevator to store his beans. To Malone, petitioners' picketing was "punitive", *Pennington v. Birmingham Baseball Club, Inc.*, 277 Ala. 336, 170 So. 2d 410 (1964).

Petitioners violated Malone's constitutional rights, and contravened the valid State policy of law, as reflected in the Alabama Constitution, its statutes and its case law, and the evidence of such violation was so obvious as to compel the issuance of the injunction.

Petitioners complaint that a lack of State findings of fact and conclusions of law as to "anti-social conduct" has "left them in the dark". It is submitted that by never requesting any more definitive findings from either the State Trial Court or Supreme Court, petitioners decided long ago that their position, made frail and tenuous by the compelling weight of the evidence, deliberately chose not to request any more specific findings. In other words, finding the light of the evidence to be extremely harmful, petitioners have opted to assume a position of being "left in the dark". Such a position is of no avail. The State Supreme Court was entitled, from the transcript of the evidence before it, "to draw the inference" of the illegal purpose and manner of petitioners' pickets, as reflected in its opinion. *Vogt, supra*, pp. 294-295.

CONCLUSION

Petitioners accuse the State Supreme Court of conjuring up a new cause of action against them, and ignoring the decisions of this Court. Nothing could be further from the truth. The decision below followed the decisions of this Court and applied the valid State policy in expressing the framework structured by this Court within which petitioners' activities should be confined. The evidence showed clearly that petitioners' illegal purpose and manner of posting the pickets to be well beyond the limits for same, as declared by this Court. Petitioners demands that all the courthouse doors, State and Federal, be closed to farmer Malone, who is supposed to find recourse and solace in the NLRB whenever and wherever petitioners next decide to shut down a U. S. Port by picketing all foreign flag vessels calling or even intending to call at such Port. This raw, unbridled quest for power is not permitted by law, and must be denied.

The petition is due to be dismissed.

Respectfully submitted,

Alex F. Lankford, III
Counsel for Respondent
Robert E. Malone

OF COUNSEL:
Hand, Arendall, Bedsole,
Greaves & Johnston
3000 First National Bank Building
Mobile, Alabama 36602

CERTIFICATE OF COUNSEL

I, Alex F. Lankford, III, attorney for respondent Robert E. Malone, do hereby certify that on this ____ day of January, 1974, three copies of the foregoing brief in opposition to the petition for writ of certiorari have been served on each of the following attorneys of record:

Howard Schulman, Esq.
Schulman, Abarbanel and Schlesinger
1250 Broadway
New York, New York 10001
and
Otto E. Simon, Esq.
Simon and Wood
1010 Van Antwerp Building
Mobile, Alabama 36602
Attorneys for Petitioners

Frank McRight, Esq.
Armbrecht, Jackson & Demouy
1101 Merchants National Bank Building
Mobile, Alabama 36602
Attorneys for respondent
Mobile Steamship Association

by mailing the same to them through the United States Postal Service, postage prepaid.

Alex F. Lankford, III

Supreme Court, U. S.
FILED
JUN 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Statement	4
The Facts	4
The Litigation	8
Summary of Argument	10
1. Preemption	10
2. Free Speech	12
Argument	
I. Where respondents, American citizens, complained of petitioners' conduct in the port of Mobile, Alabama, alleging activities violative of the Act's Section 8(b)(4), Alabama state courts were without jurisdiction to grant injunctive relief, notwithstanding the objects of the pickets were foreign flag vessels. Such conduct is preempted by the NLRB	14
II. Peaceful, primary, informational picketing to protest the loss of domestic jobs to foreign flag vessels paying wages and benefits substandard to American flag vessels, concomitantly requesting persons to ostracize and not patronize such foreign flag vessels, is an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama courts	19
Conclusion	27

TABLE OF AUTHORITIES

PAGE

Cases:

Allee v. Medrano, —— U.S. ——, No. 72—1125, decided May 20, 1974 ..... 12, 20, 23
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 313 ..... 12, 13, 20, 23

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 ..... 10, 11, 15, 17, 18
Building Service Employees International Union v. Gazzam, 339 U.S. 532 21

Carlson v. California, 310 U.S. 106 23

Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 24

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 ..... 12, 16, 19
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 10, 21, 22
Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932 ..... 12, 17

Hughes v. Superior Court, 339 U.S. 460 ..... 10, 21

Incres Steamship Company v. International Maritime Workers Union, 372 U.S. 24 ..... 10, 15
International Brotherhood of Teamsters Union v. Hanke, 339 U.S. 470 ..... 10, 21, 22
International Longshoremen's Association Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 18
International Wood Workers of America (T. Smith & Sons, Inc.), 125 NLRB 209 18

Local 761 International Union of Electrical, etc. v. NLRB, 366 U.S. 667 ..... 14, 26

PAGE

Local Union No. 10 etc. v. Graham, 345 U.S. 192, 197 13, 24, 26
Local Union No. 25 v. New York, New Haven & H.R. Co., 350 U.S. 155 ..... 12, 17

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 ..... 12, 17
McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10 ..... 10, 15

NAACP v. Button, 371 U.S. 415, 444 22

Pennington v. Birmingham Baseball Club, 277 Ala. 336, 170 So. 2d 410 22
Plumbers, etc. Local 298 v. County of Door, 359 U.S. 354 ..... 12, 17
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 ..... 12, 20, 22, 23
Port of Houston Authority etc. v. International Organization of Masters Mates etc., et al., 456 F.2d 50 (5 Cir.), cert. den. 409 U.S. 894 7

Ramey Construction Co. Inc. v. Local Union No. 544, Painters, etc., 472 F.2d 1127 (5 Cir.) 14, 27

Seafarers International Union v. NLRB, 265 F.2d 585, 592 (D.C. Cir.) 14, 26

Teamsters etc. v. Vogt, Inc., 354 U.S. 284 ..... 10, 13, 21
Teamsters Local 20 v. Morton, 377 U.S. 252 17
Thomas v. Collins, 323 U.S. 516 20
Thornhill v. Alabama, 310 U.S. 88 ..... 12, 20, 23

United Steelworkers v. NLRB, 376 U.S. 492 ..... 14, 26

PAGE

Washington-Oregon Shingle Weavers' Council, 101 NLRB 1159 18
Windward Shipping (London) Ltd. et al. v. American Radio Association, AFL-CIO, et al., —— U.S. ——, 94 S.Ct. 959 ..... 7, 11, 18, 19, 20

Statutes and Regulations:

National Labor Relations Act
§2 16
§7 2
§8 (b) (4) 2, 11, 18
28 U.S.C. §1257 (3) 2
46 U.S.C. §1242 (a) 18
46 U.S.C. §1283 (a) 18
26 C.F.R. §308 18

Congressional Materials:

Hearings, Energy Transportation Security Act of 1974, House Subcomm. on Merchant Marine, 93rd Cong., Ser. No. 93-26 18

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Supreme Court of Alabama, dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is set forth at pages 5a-26a* and is reported at 279 So.2d 467.

The denial by the Supreme Court of Alabama, dated July 5, 1973, of the application for rehearing, which was entered without opinion, is set forth at page 27a.

* References are to pages of Single Appendix.

The order for injunction of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth at pages 28a-30a; that court issued no opinion, findings of fact or conclusions of law.

Jurisdiction

The order of the Supreme Court of Alabama issued and was entered on May 3, 1973 (5a-26a). An application for a rehearing was denied on July 5, 1973 (27a). Petitioners' time to file their petition for a writ of certiorari was extended to and including November 9, 1973, by order of Mr. Justice Powell, Jr., dated September 18, 1973. The petition for certiorari was filed in this Court on November 8, 1973 and was granted on February 25, 1974. The time to file petitioners' Appendix and brief on the merits was duly extended to June 15, 1974.

The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The relevant Constitutional provisions are:

"Article VI, 2nd Paragraph (Supremacy Clause); First and Fourteenth Amendments."

The relevant statutory provisions are:

"National Labor Relations Act, Sections 7, 8(b)(4); 29 U.S.C. §§157, 158(b)(4)."

The text of these statutory provisions is set forth in the Appendix (1a-4a).

Questions Presented

The state court injunction prohibited peaceful primary informational picketing of foreign flag vessels in the Port of Mobile. The picketing, in the nature of a "Buy American" campaign, protested the loss of jobs of American seamen to foreign flag vessels paying substandard wages and benefits. The picketing was conducted by a group of American maritime unions which did not seek to represent, organize or support the crews of the foreign flag vessels. Some American workers voluntarily refused to cross the picket line. The complainants were an association comprising local stevedoring companies and shipping companies in the Port of Mobile and a local farmer whose produce was shipped through that port. The injunction was issued without any opinion, findings of fact or conclusions of law. The questions thus presented are:

1. Whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board.

2. Whether the prohibition of peaceful informational picketing abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution.

Statement

The Facts

The union petitioners are six American maritime unions (42a-43a), representing a substantial majority of American merchant seamen. Petitioners in 1971, formed into a Committee of American Maritime Unions in an endeavor to formulate and implement plans to arrest the alarming and accelerating decline in the number of jobs aboard American merchant vessels, available to their members (92a-95a), brought about by foreign flag vessels carrying American seaborne commerce and paying substandard wages and benefits, in contrast to those paid American merchant seamen, union petitioners' members (92a-94a).

The union petitioners specifically agreed to selectively and peacefully picket foreign flag vessels at United States ports, truthfully publicizing the competitive advantage of the foreign flag vessels, the adverse consequences thereof upon their members and simultaneously appeal to the public not to patronize such foreign flag vessels (95a). In connection with such peaceful publicity picketing, the Committee prepared picket signs which read as follows:

> "'ATTENTION TO THE PUBLIC
>
> "'The wages and benefits paid aboard the vessel SS * are substandard to those of the American seamen. This results in extreme damage to our wage standard and the loss of our jobs.
>
> "'Please do not patronize these vessels. Help the American seamen.
>
> "'We have no dispute with other vessels at this site.'" (95a)

[The names of the picketing unions appeared beneath the quoted matter.]

* Name of vessel was inserted in the blank space.

The Committee further prepared pamphlets for distribution which publicized information of similar import to that set forth on the picket sign and which read:

> "TO THE PUBLIC
>
> "American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> "American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> "A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> "PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> "Our dispute here is limited to the vessel picket at this site, the SS ."
>
> [The names of the picketing unions appeared at the bottom of the pamphlets] (91a).

Finally, the Committee set forth written instructions, distributed by each Committee member to its local representatives, advising them of the Committee's action and decision to engage in truthful publicity and picketing and relating to the carrying out of the Committee's program. Such advice and instructions stated:

Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.

In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.

Our organization will participate in carrying out this publicity picketing.

In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.

1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.

2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be instructed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.

3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.

5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call their Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.

6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.

7. No one has authority to change these instructions except upon specific written authority from your Headquarters.

[The names of the picketing unions appeared beneath the quoted matter.] (113a, 114a)[1]

At the Port of Mobile, the unions requested permission from the Alabama State Docks ("Docks"), to picket alongside foreign flag vessels within the former's premises and upon refusal picketed immediately in front of the Docks' premises with the foregoing picket signs referring thereon to the named vessels (96a). Shortly thereafter the Docks

1. See *Windward Shipping (London), Ltd., et al.* v. *American Radio Association, AFL-CIO, et al.*, —— U.S. ——, 94 S. Ct. 959 (February 1974), and *Port of Houston Authority, etc.* v. *International Organization of Masters Mates, etc., et al*, 456 F.2d 50 (5 Cir.) 1972 (cert. den. 409 U.S. 894), involving the union petitioners in the identical national picketing dispute as part of the Committee's program as at bar and the findings as to the purposes and objects thereof, to wit, truthful publicity picketing and dissemination of information as to the issues regarding American merchant seamen, depressed employment opportunities and the substantial cause thereof.

granted permission (96a) to picket within their premises and no more than four pickets patrolled with the picket signs, with the picketing shortly thereafter limited to one vessel, the Liberian vessel, AQUA GLORY (7a, 8a). The picketing was peaceful, no violence or mass picketing, trespassing or blocking of ingress or egress to the premises; no shouting or assault and no acts of force (8a). The pickets carrying the aforementioned signs remained silent and distributed the aforesaid pamphlets (8a). Longshoremen individually refused to cross the picket line (71a) and as a consequence, the AQUA GLORY was not serviced (9a, 71a).

Respondent Mobile Steamship Association, Inc. ("Association") is a non-profit corporation, organized and existing under Alabama law. Its membership consists of steamship and stevedoring companies doing business in Alabama (67a). The Association is the collective bargaining representative and contract negotiator for such companies, in their labor management business relations with the International Longshoremen's Association who represent stevedoring employees employed by the Association's members, and particularly at the Port of Mobile, Alabama (5a-6a, 35a).

Respondent Robert E. Malone, is a farmer in Mobile County, Alabama. He is engaged in growing soybeans which are delivered to grain elevators at the Docks and thereafter loaded aboard vessels for export (6a).

The Litigation

The Association filed suit in an Alabama state court seeking to enjoin the picketing as tortious under Alabama law. The basis for the claim was that the unions had directed employees of the Association members to refuse to work upon or serve such picketed vessels and that the same, together with the threat to picket other foreign flag vessels constituted unlawful interference with the contractual relationship between Association members and the companies operating the picketed vessels, and the Association members' right to carry on their lawful business (37a-39a). Respondent Malone intervened (6a) and claimed the unions' activity similarly unlawfully interfered with his right to carry on his lawful business (47a).

The petitioners, by way of demurrer, presented several defenses, including, that the jurisdiction of the Alabama court was preempted by the NLRA and that the picketing activities were peaceful information picketing protected by the First and Fourteenth Amendments. After hearing and without any findings of fact or conclusions of law and without opinion, the Alabama Circuit Court issued its broad preliminary injunction order, totally silencing the petitioners' activities, including restraining the use of their spoken words (28a-30a), although the evidence is clear that no words were spoken. Upon petitioners' appeal to the Alabama Supreme Court, the Court in an apparent effort to salvage the Circuit Court's preliminary injunction, stated:

> "The trial judge's decree, granting the writ of temporary injunction, made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business, for otherwise, he would not have ordered the writ of temporary injunction to issue." (20a, 21a).

The Alabama Supreme Court, citing *Benz, Incres* and *McCulloch,* discussed *infra,* and directing its opinion to the issues raised upon appeal, *inter alia,* held that there was no preemption by virtue of the NLRA because the picketed vessels were foreign flag vessels and that consequently the State Circuit Court possessed the requisite jurisdiction (10a-13a). It also held that since there was a hope by a low level representative of one of the Committee's Unions that longshoremen would not cross the picket line and because such hope was realized, there was a tortious interference with the business of the respondents, activities without the protection of the First Amendment and concerning which Fourteenth Amendment strictures were inapplicable. Reliance for such conclusion (17a-25a), was based upon this Court's decisions in *Vogt, Inc., Giboney, Hughes* and *Hanke,* discussed *infra.*

Summary of Argument

1. Preemption

American merchant seamen and their unions, were engaged, on public thoroughfares or private property with the consent of the owner, in peaceful, truthful and non-obstructive picketing of select foreign flag vessels in the United States, protesting and publicizing that such vessels' wages and conditions were substandard to those of American merchant seamen, thus allowing such foreign flag vessels transporting American seaborne commerce a most substantial competitive advantage over American flag vessels, and that there resulted a most substantial decline in their domestic job opportunities. The object of the picketing was emblazoned on the picket signs and repeated in

the leaflets distributed by the mute pickets, namely, that the public should not patronize, in effect should boycott or not work upon, such select picketed foreign flag vessels.

The picketing petitioner unions and their members, may not have their activities restrained by state courts upon complaints of American stevedoring companies and other American persons doing business at the picketed site, alleging that the petitioners' activities were partially successful, in that they directed employees of the American stevedoring companies to refuse to work upon, or to provide services for or to the picketed vessels, resulting in interference with and preclusion of, other Americans from delivering their products at such sites.

Neither the *Benz* trilogy, *infra,* nor this Court's opinion in *Windward Shipping (London) Ltd. et al.* v. *American Radio Association, AFL-CIO, et al.,* —— U.S ——, 94 S.Ct. 959, holding that petitioners' identical picketing and conduct directed against a foreign flag vessel owned by a foreign shipowner[2] was not "in commerce" within the meaning of the Act, do not authorize state court jurisdiction of the complaints of respondents, American stevedoring companies and an American farmer. Those complaints allege that the picketing is directed at their business activities and constitutes an interference with the business activities of the Americans. Such picketing is "in commerce". The determination of the conduct alleged in the complaints is within the exclusive competence of the NLRB by virtue of the Act's §8(b)(4), as either lawful or pro-

2. As to a foreign flag vessel not owned by a foreign shipowner, but instead owned by an American shipowner, and constructively deemed an American vessel under effective U.S. control, see fn. 5, *infra.*

hibited activity. In either event, state courts are preempted from exercising jurisdiction. *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485.

Notwithstanding that the entity against which the picketing is directed may not be within the coverage of the Act, the conduct complained of by the respondents is nevertheless preempted to the NLRB. *Local Union No. 25* v. *New York, New Haven and H.R. Co.,* 350 U.S. 155; *Plumbers, etc. Local 298* v. *County of Door,* 359 U.S. 354.

The object of petitioners' dispute may be foreign. However, respondents complain that petitioners' activities were secondary, involving employees of stevedoring companies, etc., working at Mobile, Alabama. Under such posture, respondents' complaint is domestic and state courts possess no jurisdiction to grant injunctive relief to respondents, as jurisdiction is exclusively within the NLRB. *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967; *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932.

2. Free Speech

Petitioners' picketing constitutes in all respects, a traditional exercise of the right of free speech guaranteed by the First Amendment—an important and protected activity in labor disputes and immune from state court interference, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308, 313; *Thornhill* v. *Alabama,* 310 U.S. 88; *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 and *Allee* v. *Medrano,* —— U.S. ——, No. 72—1125, decided May 20, 1974.

Although states within their domain may regulate picketing not federally preempted, such regulation must be in implementation of a clear and valid public policy. *Teamsters, etc.* v. *Vogt, Inc.,* 354 U.S. 284. Premising an assumed valid state public policy solely on the generic term of wrongful interference with business, without expressing or defining what constitutes such wrongfulness, so as to permit state court restraint of conduct, as at bar, is contrary to, and in violation of, First and Fourteenth Amendment guarantees, *Logan Valley, supra.* Nothing contained in the panoply of constitutional rights authorizes state courts, as at bar, to exalt property rights over First Amendment guarantees of freedom of speech and assembly.

Equally significant, is that before states, even within their domain, may impinge upon or abridge what has been guaranteed by the Bill of Rights, specific findings related to reality, must be made by the restraining court. *Local Union No. 10 etc.* v. *Graham,* 345 U.S. 192, 197. Such requisite task was not performed, let alone attempted, by the Alabama courts. Endeavors by the Alabama Supreme Court to create non-existent findings by inferences, based upon personal hopes or expectations of a lone witness—hopes as to the success of the picketing activities by a person without authority and charged solely with perfunctory administrative duties—do not constitute compliance with the requirement for findings consistent with concerns for and protection of the fundamental guarantees of freedom of speech.

Finally, contrary to the Alabama Supreme Court's conclusions, hopes and expectations of the success of lawful

picketing activities in labor disputes, do not convert the activities into unlawfulness. *Seafarers International Union* v. *NLRB*, 265 F.2d 585, 592 (D.C. Cir.); *Local 761 International Union of Electrical, etc.* v. *NLRB*, 366 U.S. 667; *United Steelworkers* v. *NLRB*, 376 U.S. 492, 501 and *Ramey Construction Co. Inc.* v. *Local Union No. 544, Painters, etc.*, 472 F.2d 1127 (5 Cir.).

ARGUMENT

I.

Where respondents, American citizens, complained of petitioners' conduct in the port of Mobile, Alabama, alleging activities violative of the Act's Section 8(b)(4), Alabama state courts were without jurisdiction to grant injunctive relief, notwithstanding the objects of the pickets were foreign flag vessels. Such conduct is preempted by the NLRB.

Respondent Association, an Alabama corporation, does business in Alabama, with its principal business in the port of Mobile (33a); it is the collective bargaining representative of stevedore employer members in the port of Mobile; it bargains and executes collective bargaining agreements with the International Longshoremen's Association (68a) and files and causes to be processed, unfair labor practice charges with the NLRB (68a). Without question, the Association is an employer under the Act.

Respondent Malone is a farmer engaged in farming in Alabama and transports his agricultural products to the docks at the port of Mobile for foreign export (43a, 44a).

Both respondents, Association and Malone, in their pleadings, complained that petitioners' picketing of the foreign vessels, at the Mobile docks, consisted of conduct directed to employees of employers other than the vessels, "to refuse to provide any work or service with respect to such vessels" (37a, 47a). Additionally, both respondents alleged that employee longshoremen of Association's members, refused to cross the picket line and work upon the picketed vessels (36a, 46a). Further complained of by both respondents, was that such picketing activities constituted an unlawful interference with respondents' contractual relations and unlawful interference with their right to carry on their business (37a, 47a).

Notwithstanding the foregoing admitted facts, that both respondents are American citizens, "employer" or "person" under the Act, that the conduct occurred at the loading docks in Mobile, Alabama, involving water transportation there and the storage or loading of products for such transportation, and the further allegations of interference or inducement to employees of other employers to cease doing business, nevertheless the Alabama Supreme Court, without any trial court findings or conclusions, concluded the Act inapplicable because the objects of the picketing, the foreign vessels, were not "in commerce", citing *Benz* v. *Campania Naviera Hidalgo*, 353 U.S. 138; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 and *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U.S. 24.

Unquestionably, the Association, constituting stevedoring companies employing longshoremen to load and discharge vessels at the port of Mobile, Alabama, is an "em-

ployer'' engaged in ''commerce'' under the Act, and equally unquestionably, respondent Malone, delivering his soybeans to the dock elevator, is a ''person'' engaged in ''commerce'', under the Act.[3]

Where it is charged, such as at bar, that petitioners directed employees of Association members, ''to refuse to provide any work or service with respect to such (picketed) vessels'' (37a, 47a), and by virtue of petitioners' picket lines at said vessels, Association members' employees refused to work upon said vessels (36a, 47a), such complained of conduct constitutes a charge of violation of the Act's §8(b)(4). In such a posture, exclusive jurisdiction to evaluate and determine the conduct for injunctive remedy, if any, is with the NLRB, *Garner* v. *Teamsters Chauffeurs & Helpers Local Union No. 776,* 346 U.S. 485. Such exclusive

3. Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

NLRB jurisdiction,[4] remains inviolate, notwithstanding the union's activities are directed at an entity whose employer-employee relations, similar to those at bar, may not be subject to the Act's coverage. *Local Union No. 25* v. *New York, New Haven and H. R. Co.,* 350 U.S. 155; *Plumbers etc. Local 298* v. *County of Door,* 359 U.S. 354.

The foregoing issue and its mandated result for NLRB exclusive jurisdiction—preemption—is not unique. In *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932, a Canadian flag vessel was picketed by unions in the United States. In defense against charges of unfair labor practice before the NLRB, and the Board's application for preliminary injunction pursuant to the Act's §10(1), the unions contended that there was no NLRB jurisdiction—no ''commerce'', by reason of this Court's *Benz* trilogy holdings *supra.* Such defense was rejected by both Circuits, the D.C. Circuit stating:

> ''The short answer is the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country, ''directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.'' 376 F.2d at 776.

And so at bar. The conduct respondents here complain of and allege—the secondary activity, the direction and inducement of Association member's employees not to work

4. Discussed here, is solely the issue of the granting of injunctive relief and not actions for compensatory damages for the violations of the Labor Management Relations Act's §303, as to which state court jurisdiction is concurrent. *Teamsters Local 20* v. *Morton,* 377 U.S. 252.

the picketed vessels and not to load the soybeans and other commodities thereon, are allegations of traditional secondary bycott, activity protected or prohibited under the Act's §8(b)(4). Although the dispute with the vessels may be foreign,[5] the petitioners' activities respondents complain of here, are domestic.[6]

5. This Court's recent decision in *Windward Shipping etc. et al.* v. *American Radio Association, AFL-CIO, et al.*, —— U.S. ——, 94 S. Ct. 959, decided February 19, 1974, six days prior to the grant of certiorari in the instant case, passed upon identical picketing activities, but there in Houston, Texas. The Court concluded that petitioners' lawful and peaceful protest picketing activities did not meet the "in commerce" test as in *International Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, but instead were within the reach of the *Benz* trilogy. By reason of *Windward's* posture, arising from the Texas courts and there premised upon *Ariadne* alone, not presented or considered by this Court and therefore left open in *Windward*, which was limited to "foreign shipowners" of foreign flag vessels, 94 S. Ct. at 965, was preemption with respect to major corporate American citizen-owned vast fleets of foreign flag vessels, practically all of the American petroleum industry or of American multi-national corporations, all registered and flying Panamanian, Liberian or Honduran flags, under a defined category of "effective U.S. control" ("EUSC"), which are deemed constructively American, pursuant to 46 U.S.C. §§1242(a), 1283(a) and 46 C.F.R. 308.1-308.536; see *Hearings, Energy Transportation Security Act of 1974, House Subcomm. on Merchant Marine*, 93rd Cong., Ser. No. 93-26, pp. 21, 22, 52-72, 605, 606, 608-612. None of the *Windward ratio decidendi*, nor the concern for traditional comity in international maritime affairs, apply to those American owned "EUSC" vessels; i.e. non-existent would be the *Windward* concern for, "the private balance sheets of the foreign shipowners", or a concern that there might be "retaliatory action" or "exacerbat(ion) and broaden(ing) (of) the present dispute", by the registered nations against American vessels, since such EUSC vessels' voluntary commitment to the U.S. and to American citizens' control is with the advance consent and understanding of Liberia, Panama and Honduras, or a concern as to "predictable response(s)", of a foreign shipowner, 94 S. Ct. at 965, since such vessels are American corporate citizen-owned with "American directors, American officers, and American shareholders [who] have made [EUSC] a solemn commitment", *Hearings, ibid.* pp. 608, 609.

6. See: *Washington-Oregon Shingle Weavers' Council*, 101 NLRB 1159, 1161 (1952) and *International Wood Workers of America (T. Smith & Sons, Inc.)*, 125 NLRB 209 (1959), where the primary dispute was Canadian, but the conduct complained of found to be domestic, occurring here in the United States and subject to NLRB appropriate remedy.

The Alabama courts were without authority to assume jurisdiction of respondents' complaints and issue injunctive relief. Jurisdiction is preempted by the NLRB, vested with exclusive authority to pass upon the conduct complained of and to determine the granting of injunctive relief, if any, *Garner, supra.*

The order of the Alabama Circuit Court as affirmed by the Alabama Supreme Court should be reversed and vacated and respondents' complaints dismissed.

II.

Peaceful, primary, informational picketing to protest the loss of domestic jobs to foreign flag vessels paying wages and benefits substandard to American flag vessels, concomitantly requesting persons to ostracize and not patronize such foreign flag vessels, is an exercise of constitutionally protected freedom of speech and should not have been enjoined by the Alabama courts.

As recently found by this Court in *Windward*, 94 S.Ct. at 961, and as the record here demonstrates, petitioners unions, representing a substantial majority of American merchant seamen, agreed to undertake, as a Committee, joint action to arrest an accelerating decline in job opportunities for their members in the United States, attributable to substantial competitive wage and benefit advantage of foreign flag vessels transporting American seaborne commerce. In furtherance of such joint action, and pursuant to the Committee's instructions from headquarters in New York, the petitioners peacefully, truthfully and without

trespass or obstruction, picketed select foreign flag vessels. The pickets, without conversation, distributed pamphlets explaining the facts of the dispute and requested the public to ostracize and not patronize the picketed foreign flag vessels, 94 S.Ct. at 962. Such activities of petitioners' Committee, were engaged in at various U.S. ports and in *Windward, supra,* at Houston, Texas, and at bar, Mobile, Alabama. The aforesaid activities we submit, constitute the lawful exercise of protected fundamental rights of free speech.

As this Court most recently reemphasized in *Allee* v. *Medrano,* —— U.S. ——, No. 72-1125, decided May 20, 1974:

> "The Court has long recognized that the First Amendment's guarantees of free speech and assembly have an important role to play in labor disputes. *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940); *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945)."[7]

This Court in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza,* 391 U.S. 308, 313, squarely held that picketing, identical as at bar, to peacefully and truthfully publicize substandard wages and concomitantly request the public not to patronize the picketed entity, is conduct protected by the First and Fourteenth Amendments, whose principles and guarantees the states are mandated to observe inviolate. Only recently this Court again reaffirmed its *Logan Valley* holding that "* * * picketing plainly involves expressive conduct within the protection of the First Amendment * * *," *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 99.

7. P. 9, slip opinion of Mr. Chief Justice Burger concurring and dissenting and in accord with majority, slip opinion fn. 13.

At bar, the pickets, engaged in expressive conduct, doing nothing more than imploring the public, by lawful means, to euphemistically "Buy American" or "Ship American."

The Alabama Supreme Court concluded that, by virtue of this Court's authorities,[8] it was free to restrain petitioners' exercise of their First Amendment rights. Such conclusion we submit, is grievous error.

The *Vogt* Court made clear, in collating and summarizing its prior *Giboney, Hughes, Hanke* and *Gazzam* decisions, that before states may regulate or restrain a union's picketing, a mandatory precondition, *inter alia,* is that such regulation is "* * * in a domain open to state regulation", 354 U.S. at 291. As demonstrated in our Point I, *supra,* such domain has been foreclosed to the states and the regulation or restraint of the petitioners' picketing activities vested exclusively within the competence of the NLRB.

Assuming *arguendo,* that there was a domain open to Alabama for regulation, nevertheless as this Court has further informed, such regulation has been circumscribed with appropriate predicates and limitations. In *Vogt, supra,* this Court cautioned:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts no more than state legislatures, can enact blanket prohibitions." 354 U.S. at 294, 295.

8. *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490; *Hughes* v. *Superior Court,* 339 U.S. 460; *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U.S. 470; *Building Service Employees International Union* v. *Gazzam,* 339 U.S. 532 and *Teamsters, etc.* v. *Vogt, Inc.,* 354 U.S. 284.

Furthermore, a prerequisite or condition for state regulation of picketing, is that such regulation must seek implementation of a state's "valid public policy", *Hanke, supra,* a "valid law", *Giboney, supra.* Additionally, where as here, "the picketing plainly involves expressive conduct within the First Amendment", *Mosley, supra,* the state must advance a "* * * substantial regulatory interest in the form of substantive evils flowing from petitioners' activities", to justify its restraint, *NAACP* v. *Button,* 371 U. S. 415, 444. Such mandatory constitutional test was not met at bar.

The Alabama courts advise,[9] that such allegedly valid state law, its valid public policy, is,

> "The right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process." (20a).

What is wrongful or unlawful interference is never expressed or defined, let alone clearly so. Surely valid state policy is not the rendering mute of labor unions and restraining their truthful protest picketing, so that an Alabama resident, permanent or temporary, may be immunized from protest of substandard wages and working conditions. Nor is such truthful, lawful picketing, "wrongful" interference with that person's business. Any such policy would patently not be valid. It would exalt property rights and their preservation over the exercise of treasured and most valuable First Amendment rights. It would insulate and freeze the present and foreclose advocacy of change for the future.

9. *Pennington* v. *Birmingham Baseball Club,* 277 Ala. 336, 170 So. 2d 410.

Under the foregoing Alabama "state policy" the constitutionally protected activity and conduct found in *Logan Valley, supra,* reaffirmed in *Mosley, supra,* picketing to publicize substandard wages and appeals to persons not to patronize the picketed business, is, *ipsi dixit,* converted into wrongful interference under Alabama law, warranting its restraint. This Court has time and again held, as witness most recently *Logan Valley,* that the mere fact a primary picket line may dissuade persons from patronizing a premises and may result in injury or damage, cannot be the basis for restricting the lawful and peaceful protest picketing. Guarantees of free speech preclude such a restraint, *Thornhill* v. *Alabama,* 310 U.S. 88, 104, 105; *Carlson* v. *California,* 310 U.S. 106, 112. Under Alabama's policy, this Court's recognition of the important role First Amendment guarantees of free speech play in labor disputes and concern for their preservation,[10] would be diminished to zero. The Court in *Thornhill* found Alabama's legislature to be off the loom of constitutional protection, and at bar, we respectfully submit, it is Alabama's courts who are now unfortunately off the loom.

The consistent activities and purposes of petitioners, constituting the Committee for American Maritime Unions, before this and other courts, conclusively demonstrate their uniform lawful protest picketing activities. To conclude from such activities that they constitute a "wrongful interference" as Alabama has at bar, totally ignores and rejects mandated observation of the constitutional precepts, *supra.* Compounding such error is the Alabama's court's treatment of the results of the hearing had upon respondents' applications.

10. *Allee* v. *Medrano, supra.*

As a predicate for its affirmance of the trial court's restraint, the Alabama Supreme Court stated:

> "* * * the trial judge made no finding of fact from the evidence. But apparently the trial judge found from the evidence that there was wrongful interference by the appellants with the appellees' business for otherwise he would not have ordered the writ of temporary injunction to issue." (21a)

Under such unusual judicial rationalization, appellate courts probably are unnecessary, as assumedly trial courts make proper findings or conclusions, otherwise they would not have entered their orders. Crucially significant, is that constitutional protections mandate considerably more before our fundamental rights and protections are rendered inapplicable.

In *Local Union No. 10 etc.* v. *Graham*, 345 U.S. 192, 197, this Court quoted approvingly from *Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 293, 294, as follows:

> "* * * it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact, screening reality. That is why this Court has the ultimate power to search the records in state courts where a claim of constitutionality is effectively made. * * *"

Applying the foregoing test, impelled by the importance of our constitutional freedoms and their preservation, demonstrates the grievous error of the court below.

Without the benefit of any trial findings, the Alabama Supreme Court, in order to infer what it believed the trial court found,[11] relied solely upon the enthusiastic testimony

11. Merely to express the event demonstrates its absurdity.

of a local port agent, a low level official of one of the unions comprising the Committee, to wit, a Mr. Neira, who admittedly was not a union representative to such Committee, and whose sole function and authority was to carry out the Committee's written instructions. That testimony, fairly read, unquestionably was his own personal expression of what he hoped the picketing would accomplish (107a-144a). Even in its erroneous reliances the court below did not however rely upon the totality of Neira's testimony. Instead it quoted a few vagrant personal expressions of his hope that the picketing would be effective. And the Alabama Supreme Court apparently recognized that Neira's testimony was at best only his hope, for it then relied on inapposite authority to convert such personal hope of this low level functionary, into the six picketing unions' purposes and objects (24a-25a).

Neira's testimony from the witness stand cannot, of course, change the purpose of the picketing as set forth on the picket signs and in the leaflets distributed by the mute pickets. Moreover, the purpose of the picketing was clearly set forth in the instructions which Neira received from the Committee of American Maritime Unions (113a, 114a). It is to be noted that the final numbered instruction advised that no one had authority to change the instructions except upon a writing from the Committee's headquarters. Neira testified that he had no authority to change the instructions (141a, 142a). Manifestly, whatever hope Neira entertained *in pectore* on the picket line, and later articulated on the witness stand, could not in any event have changed the purpose or the character of the peaceful primary nonobstructive informational picketing,

at the site of the vessels. It is more than distressing that the freedom of speech of American workingmen can be snatched away on such a feeble ground. Equally as distressing is that it does violence to the standards which this Court has expressly said must be met before such valuable constitutional rights may be impinged upon, *Graham, supra.*

Although the Alabama Supreme Court concluded that hope became the object or purpose and relied upon inapposite authorities to equate the terms, this Court has instructed otherwise.

In *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585, 592 (D.C. Cir.), it was held that hopes entertained by primary pickets that employees of secondary employers would not cross the picket line could not render the picketing unlawful. In *Local 761 International Union of Electrical, etc.* v. *N.L.R.B.*, 366 U.S. 667, this Court quoted with approval those portions of the opinion in the *Seafarers* case concerning the hope of the pickets that the picket line would be honored and the holding that picketing which induced secondary employees to respect a primary picket line is not the equivalent of picketing which has as an object the inducing of employees to engage in concerted conduct against their own secondary employer in order to force him to refuse to deal with the primary employer (*id.* at 673). This Court there held that primary picketing at a common situs, appealing to neutral employees whose tasks aid the primary employer's everyday operations, is not unlawful; accord, *United Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, 501. Hopes and expectations do not constitute

objects or purposes. *Ramey Construction Co., Inc.* v. *Local Union No. 544, Painters, etc.*, 472 F.2d 1127 (5 Cir.).

The foregoing demonstrates that petitioners were engaged in the exercise of activities protected by the First and Fourteenth Amendments and that the court below, by its restraint, has deprived petitioners of their freedom of speech.

Conclusion

The order of the Alabama state courts, restraining petitioners, should be reversed in all respects and respondents' complaints dismissed.

Respectfully submittted,

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

Supreme Court, U. S.
FILED
AUG 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC.
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION

Frank McRight
Kirk C. Shaw
1101 Merchants National Bank Building
Mobile, Alabama 36602
Attorneys for
Mobile Steamship Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

INDEX

Page

Opinions Below ... 1

Jurisdiction ... 2

Constitutional and Statutory Provisions Involved ... 2

Questions Presented ... 2

Statement of the Case ... 3

The Parties ... 3

The Picketing ... 3

Purpose of the Picketing ... 5

Effect of the Picketing ... 7

The Litigation ... 9

Summary of Argument ... 11

1. Preemption ... 11

2. Finality ... 13

3. Free Speech ... 14

Argument ... 17

I. The Alabama state court had jurisdiction to enjoin Petitioners' picketing of foreign-flag vessels in the Port of Mobile. ... 17

II. The constitutional question should not be decided in the absence of a final judgment. ... 23

III. Petitioners' picketing for the purpose of shutting down Alabama's public port facility to foreign shipping provided the

INDEX (Continued)

Page

Alabama court with a constitutionally permissible basis for enjoining such picketing. 27

Conclusion 50

Certificate of Counsel 52

TABLE OF AUTHORITIES

CASES:

Adderley v. Florida, 385 U.S. 39 (1966) 16, 43, 44

AFL v. Swing, 309 U.S. 659 (1940) 25

Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) . . 31, 35, 42, 43

Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769 (1942) 30

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) 12, 18, 45, 46

Berman v. Wreck-A-Pair Co., 234 Ala. 293, 175 So. 269 (1937) 24

Carpenters & Joiners Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942) 15, 40

Cox v. Louisiana, 379 U.S. 559 (1965) 16, 44

Dorchy v. Kansas, 272 U.S. 306 (1926) 40

Fruit Dispatch Co. v. National Maritime Union, 138 So.2d 853 (La. App. 1962) 20

TABLE OF AUTHORITIES (Continued)

Page

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 15, 29

Grain Elevator Workers v. NLRB, 376 F.2d 774 (D.C. Cir. 1967) 22

Hughes v. Superior Court, 339 U.S. 460 (1950) 15, 30

Incres Steamship Co. v. Maritime Workers Union, 372 U.S. 24 (1963) 21, 45, 46

Keefe v. Organization for a Better Austin, 115 Ill. App.2d 236, 253 N. E. 2d 76 (1969) 14, 25, 26

Local Union No. 25 v. New York, New Haven & Hartford Railroad Co., 350 U.S. 155 (1956) 20

Local 501, IBEW v. NLRB, 341 U.S. 694 (1951) 20

Loftin v. Parker, 253 Ala. 98, 42 So.2d 824 (1949) 39

McCulloch v. Marineros de Honduras, 372 U.S. 10 (1963) 11, 12, 18, 19

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7th Cir. 1964), *cert. denied* 379 U.S. 967 (1965) 22

Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365 (1960) 45

Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952) 25

NLRB v. Local 3, IBEW, 339 F.2d 600 (2nd Cir. 1964) 33, 34

TABLE OF AUTHORITIES (Continued)

Page

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 25

Parker v. Ebsco Industries, Inc., 282 Ala. 98, 209 So.2d 383 (1968) 26

Pennington v. Birmingham Baseball Club, 277 Ala. 336, 170 So.2d 410 (1964) 40

Poyner v. Whiddon, 234 Ala. 168, 174 So. 507 (1937) 26

Taggert v. Weinacker's Inc., 397 U.S. 223 (1970) 25

Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950) 15, 16, 28, 31, 36, 37, 40, 44

Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957) 13, 15, 28, 29, 36, 39

Thompson v. Allstate Insurance Co., 476 F.2d 746 (5th Cir. 1973) 40

Thornhill v. Alabama, 310 U.S. 88 (1940) .. 27, 28, 29, 36

Upper Lakes Shipping v. S.I.U., 18 Wis.2d 646, 119 N. W. 2d 426 (1963) 45

Windward Shipping (London) Ltd. v. American Radio Association, ____ U.S. ____, 94 S. Ct. 959 (1974) 11, 12, 16, 17, 19, 20, 22, 48, 50

UNITED STATES STATUTES AND REGULATIONS:

Merchant Marine Act of 1970, P. S. 91-469, 84 Stat. 1018 (1970) 48, 49

National Labor Relations Act §8 2

TABLE OF AUTHORITIES (Continued)

Page

CONGRESSIONAL MATERIALS:

S. Rep. No. 91-1080, 91st Cong., 2d Sess., U.S. Code Cong. & Ad. News at 4190 (1970) 49

STATE STATUTES AND RULES:

Ala. Code, tit. 7, §1056 (1958) 39
Ala. Code, tit. 38, ch. 1-A through 1-L (1958) 42
Ala. Rules of Ct, 52 39

MISCELLANEOUS:

Cox, *The Landrum — Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. R. 257 ..... 32, 33

2 Lyons, *Alabama Practice* (1973) 39

T. Emerson, *The System of Freedom of Expression* (1970) 31, 32

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and
ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF OF RESPONDENT MOBILE STEAMSHIP ASSOCIATION

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama, is reported at 291 Ala. 201, 279 So.2d 467, and is set forth in the Appendix at 5a-26a.

The denial by the Supreme Court of Alabama of Petitioners' application for rehearing, which is dated July 5, 1973, and which was entered without opinion, is set forth in the Appendix at 27a.

The order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is set forth in the Appendix at 28a-30a.

JURISDICTION

The basis of the Court's jurisdiction is adequately set forth in Petitioners' brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution are set forth in the Appendix at 4a. Sections 7 and 8(b)(4) of the National Labor Relations Act are printed at 1a-3a of the Appendix.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Mobile County, Alabama, erred in concluding that it had jurisdiction to enjoin picketing by American unions in a dispute with foreign-flag vessels manned by foreign crews.

2. Whether the interlocutory order of the Circuit Court of Mobile County, issued in the presence of a "substantial" question involving disputed facts and reviewed by the Supreme Court of Alabama only to ascertain that the trial judge had jurisdiction of the subject matter and that he had not abused the discretion given him in such matters, is a "final" judgment for review under 28 U.S.C. §1257.

3. Whether the evidence presented to the Circuit Court of Mobile County provided that court with a basis for concluding that the picketing violated state policy in a domain open to state regulation.

STATEMENT OF THE CASE

In the fall of 1971, at the peak of soybean harvesting season in the southern United States, commerce through Alabama's only seaport, the Port of Mobile, was halted by a series of work stoppages and picketing in the Port. This is an appeal of a temporary injunction entered to stop picketing which had as its stated aim the complete blockage of all foreign-flag shipping through the Port of Mobile.

The Parties

Respondent Mobile Steamship Association is a nonprofit corporation composed of members who are in the shipping business in the Port of Mobile (App. 67a). Its membership includes stevedoring companies, steamship agents and steamship companies (U.S. flag) who do business in the Port. Respondent Robert Malone is a local farmer who grows soybeans at his farm near Wilmer, Alabama (App. 79a). Petitioners are American maritime unions which represent the substantial majority of American seamen (App. 95a).

The Picketing

For several weeks prior to the commencement of picketing by Petitioners, longshoremen represented by the International Longshoremen's Association

("ILA")* had been on strike, causing a halt to all loading and unloading of vessels in the Port of Mobile (App. 68a). This strike was restrained at noon on November 3, 1971, on application by the National Labor Relations Board (App. 69a). A few minutes after the District Court advised the parties to that proceeding that the restraining order would issue, Petitioners established a picket line at all entrances to the Alabama State Docks (App. 69a, 132a, 133a).** Pickets carried signs which complained of "substandard" wages paid to foreign seamen and requested the "public" not to "patronize" foreign-flag vessels in port at that time: the *AQUA GLORY* (Liberian flag); the *BEL HUDSON* (English flag); the *PRESIDENT QUEZON* (Philippine flag); and the *ILKON TAK* (Liberian flag) (App. 70a, 96a). Petitioners' picketing had the effect of causing longshoremen engaged in the loading and unloading of these vessels to refuse to cross the picket lines, thus halting the loading and unloading of the foreign vessels (App. 71a). It also prevented members of the Mobile Steamship Association from carrying out their agreements with the shipowners to load and unload the four ships (App. 71a).

Similar picketing was conducted in the Ports of Houston, New Orleans, Wilmington, San Francisco,

*The Petitioners and the ILA are all affiliated with the AFL-CIO, which has appeared as amicus in this matter. One Respondent, the Masters, Mates and Pilots, is actually a division of the ILA.

**All docks, wharves, elevators and warehouses comprising port facilities in the Port of Mobile are owned and operated by the State of Alabama through its State Docks Department. See discussion *infra*.

Portland, Seattle and Duluth and was planned to be extended to other ports subject only to Petitioners' financial resources (App. 95a).

Before the picketing began, Petitioners requested permission to enter the State Docks' premises to conduct their picketing alongside the foreign-flag vessels. Their request was refused by the State Docks Supervisor (App. 96a). After two days of picketing, however, officials of the State Docks relented and allowed Petitioners to enter the State Docks' premises to lessen the effect of their picketing (App. 96a).

Purpose of the Picketing

At the hearing on the temporary injunction, Petitioners claimed, as they do here, that their picketing was for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign vessels. However, Petitioners' only witness, Louis Neira, revealed in his testimony that the unions also had other motives. Mr. Neira testified on cross-examination as follows:

(App. 125a-126a)

"Q. Now, Mr. Neira, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh, yes.

Q. What percentage of the vessels that call here at the Port are of foreign flags?

A. I would say about 70 to 80 percent.

Q. Yes, sir. And it's your instructions from your International Headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?

A. Within my resources, yes, to picket every one.

Q. All right, sir. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good Union men would not cross those picket lines?

A. We were hoping that they wouldn't do that.

Q. Yes, sir. And this hope has been fulfilled in the Port of Mobile as far as longshoremen are concerned, isn't that true?

A. Well, to a point, yes.

Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?

A. My hope is to clutter up the Port of Mobile with foreign ships — Liberian, Panamanian ships — to bring sufficient pressure on the United States Government to do something about the American merchant marine.

Q. That's your intention?

A. Yes, sir.

Q. That's your purpose?

A. Yes, sir."

(App. 130a)

"Q. ... You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?

A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association."

(App. 140a)

"Q. Mr. Neira, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain [soybeans], aren't you?

A. Yes."

Effect of the Picketing

At the time Petitioners began their picketing, farmers in the southern United States were harvesting their soybean crop, much of which was to be exported for sale overseas (App. 74a, 77a-80a). An estimated 13,000,000 bushels of soybeans, valued in excess of $50,000,000, were in the fields of Alabama and in the elevators at the Alabama State Docks, waiting to be shipped through the Port of Mobile (App. 74a). Soybeans must be harvested when ripe, otherwise they will be lost (App. 77a, 78a). The elevators at the Alabama State Docks and other storage facilities can accommodate only a small amount of the annual crop so there must be a continuous flow through the State

Docks' facilities into ships for carriage (App. 74a, 78a, 86a, 87a).

Petitioners' picketing brought an immediate halt to the loading and unloading of ships at the State Docks (App. 61a-75a). As a result of the longshoremen's refusal to cross Petitioners' picket lines to load or unload vessels, millions of bushels of soybeans were in danger of being lost through spoilage (App. 74a).

The Alabama State Docks' facilities were largely idled by the picketing (App. 74a). Member companies of the Mobile Steamship Association lost in excess of $15,000 per day in fixed overhead costs while the picketing continued (App. 73a). Charterers of ships forfeited vessel demurrage costs ranging from $2,000 to $5,000 per day per vessel (App. 73a) and ocean freight revenues at the rate of $35,000 per day per vessel (App. 74a).

Other facets of the Mobile economy were affected by the picketing at the State Docks. It has been estimated that the Mobile economy loses in excess of $3,300,000 per week from a work stoppage in the Port (App. 74a). Thus, the work stoppage caused by Petitioners had an immediate and significant impact on the economy of Mobile and its neighboring communities. Other forms of transportation, such as rail, barge, and truck lines, which would normally have been busy moving cargo in and out of the Port were idled with resultant losses (App. 74a). Manufacturers dependent upon raw materials flowing through the State Docks were slowed in their production (App. 74a).

The Litigation

On November 5, 1971, the Mobile Steamship Association filed an action in the Circuit Court of Mobile County, Alabama, seeking temporary and permanent injunctive relief against Petitioners' picketing (App. Ia). The trial judge refused to grant *ex parte* injunctive relief and ordered that the matter be set down for hearing. Shortly thereafter, Respondent Malone applied for and was given permission to file a complaint as intervenor. Following an unsuccessful effort by Petitioners to remove the case to the U.S. District Court (App. Ia), the matter was heard on November 10, 1971. The parties presented affidavits, oral testimony and exhibits. After the hearing, the court took the matter under submission and on the following day entered an order granting temporary injunctive relief. The temporary injunction was conditioned on Complainants' posting a bond of $5,000 to pay all damages and costs of the unions if the injunction were dissolved (App. 145a).

Petitioners made no effort to seek a hearing on the merits, or to modify the temporary injunction, or to have the trial court enter findings of fact or conclusions of law. Instead, they elected to take an immediate appeal to the Supreme Court of Alabama.*

---

*This appeal could have been expedited, Ala. Code, tit. 7, §1057 (1958); Petitioners delayed its hearing for over a year by requesting and obtaining eight extensions of time for the filing of the transcript and their brief.

While Petitioners' appeal to the Alabama Supreme Court was pending awaiting their brief, Petitioners filed a separate action in the United States District Court for the Southern District of Alabama seeking to restrain enforcement of the state court's injunction. The District Court refused preliminarily to enjoin the state court proceedings, and Petitioners appealed to the Fifth Circuit Court of Appeals. That court affirmed the District Court's decision, holding that the District Court had not abused its discretion in refusing the requested preliminary relief. *American Radio Association v. Mobile Steamship Association*, 483 F.2d 1 (5th Cir. 1973).

Subsequently, Petitioners' appeal of the temporary injunction was argued to the Supreme Court of Alabama which, on May 3, 1973, affirmed the lower court's order (App. 5a). Petitioners' application for rehearing was denied on July 5, 1973 (App. 27a). In its opinion, the Alabama Supreme Court noted that while a "substantial" question of fact concerning the true purpose of Petitioners' picketing "remained to be decided", the "immediate [economic] circumstances obliged [the Circuit Judge]", in the exercise of the "wide discretion accorded him in a matter of this kind", to order the temporary writ (App. 23a). The court reviewed the evidence concerning the purpose of picketing, particularly the testimony of Mr. Neira, and concluded that the Alabama policies of "balancing conveniences" and "maintaining the status quo" until a final hearing were best served by ordering a temporary injunction since "the issue of who will prevail on final hearing is not concluded on a preliminary hearing to determine whether an injunction *pendente lite* will issue or not" (App. 22a).

SUMMARY OF ARGUMENT

1. Preemption

The Court's decision in *Windward Shipping (London) Ltd. v. American Radio Association* ____ U.S. ____, 94 S.Ct. 959 (1974), is dispositive of the preemption issue here. In *Windward*, the Court held that the jurisdiction of Texas state courts over picketing of the type conducted by Petitioners in this case was not preempted by the National Labor Relations Board because the picketing interfered with the maritime operations of foreign vessels and, was not, therefore, "in commerce" within the meaning of the National Labor Relations Act.

Petitioners attempt to distinguish *Windward* from the case at bar on two bases. First, they argue that *Windward* was limited to picketing of foreign-owned, foreign-flag vessels and left open the pre-emption question with respect to American-owned, foreign-flag vessels "flying Panamanian, Liberian or Honduran flags." Not only is that distinction factually unsupported, it is a distinction which this Court has considered and rejected in *McCulloch v. Marineros de Hondurus*, 372 U.S. 10 (1963). There the NLRB argued that under its "balancing of contracts" theory it properly exercised jurisdiction over American-owned, foreign-flag ships, even though it had been denied jurisdiction over foreign-owned, foreign-flag ships six years

earlier in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). This Court rejected the NLRB's argument concluding that the question was more basic: "namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. The Court held in *McCulloch* that Congress did not intend the Act to so apply. That conclusion was affirmed by the Court in *Windward* and is applicable here.

Petitioners' second attempted distinction between *Windward* and the case *sub judice* is that because the instant suit was filed by American stevedores, and not foreign shipowners, the dispute is between American parties and is "in commerce" within the meaning of the Act. That reading of *Woodward* misses the *ratio decidendi* of the case which was that because the picketing interfered with the maritime operations of foreign-flag vessels, it was not "in commerce." The identity of the vessels, and the circumstances surrounding the picketing of them, were the important considerations in *Windward* — not the identity of the party seeking to restrain the picketing. Both the foreign shipowners and the American stevedores were injured by Petitioners' conduct which, because it interfered with the maritime operations of the foreign vessels, was outside the NLRB's jurisdiction. That the injunction was obtained here by American stevedores, and not the foreign shipowners, does not alter the fact that the NLRB does not have jurisdiction of the underlying dispute between the American unions and the foreign vessels. None of the cases cited by Petitioners dictate a contrary conclusion.

2. Finality

The pivotal issue in Petitioners' argument that the instant temporary injunction violates their First and Fourteenth Amendment guarantees of free speech is whether their picketing was "counter to valid State policy." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 291 (1957). The Alabama courts so concluded. However, Petitioners argue that those courts made incorrect inferences from, and gave too much weight to, the testimony of the unions' witness, Mr. Louis Neira, whom Petitioners characterize as a "low level functionary" (Pet. brief at 25). That argument as to the weight and significance of Mr. Neira's testimony underscores that the present appeal of a temporary injunction is not a "final judgment or decree" under 28 U.S.C. §1257.

The Supreme Court of Alabama clearly stated that the trial court's granting of the temporary injunction did not decide the merits of the controversy and that "a substantial question remained to be decided" on final hearing (App. 22a). Under settled Alabama law, the purpose of a temporary injunction is to maintain the status quo until a final hearing can be had on the merits of a controversy. It is issued when, in the trial judge's discretion, the case presents "a substantial question to be decided" and the immediate circumstances require him to act to preserve such question in its present state (App. 21a-23a). The granting of a temporary injunction is committed to the sound discretion of the trial judge, taking into consideration the relative advantages and disadvantages to the parties

resulting from his granting or refusing to grant the injunction (22a). His decision is reviewable only for abuse of discretion (App. 22a).

The case at bar is an appeal of an interlocutory order of the Circuit Court of Mobile County, Alabama. It is not a decision on the merits, nor was it reviewed by the Supreme Court of Alabama on that basis. The controversy involves a disputed question of fact, which the Alabama Supreme Court deemed "substantial," and which might be resolved differently upon further hearing. Issuance of a permanent injunction is not a foregone conclusion. Therefore, at this juncture, the case lacks the finality requisite for this Court's review. Compare *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Resolution of the constitutional issue should come only after final resolution of the disputed factual issues.

3. Free Speech

The Alabama Supreme Court held that Petitioners' picketing for the purposes described by their witness, Mr. Neira, was counter to Alabama policy. That court determined that there was sufficient evidence in the record from which to conclude that Petitioners' picketing had the aim of closing the Alabama State Docks and, therefore, the Port of Mobile, to foreign shipping. The court held that such activity constituted an unlawful interference with Respondents' businesses and that the trial court did not abuse its discretion in maintaining the status quo by granting a temporary injunction pending a hearing on the merits.

There is a broad field in which a state in enforcing some public policy can constitutionally enjoin peaceful picketing aimed at preventing the effectuation of that policy. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

Although picketing has an ingredient of communication, it cannot dogmatically be equated with constitutionally protected free speech. *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950). Picket lines may induce action of one kind or another irrespective of the nature of the ideas being disseminated (*Hughes v. Superior Court*, 339 U.S. 460 (1950)), particularly where, as here, there is evidence that the picketing is a signal intended to trigger work refusals by other organized workers. Therefore, picketing is not the inevitable legal equivalent of speech *(Hughes, supra)* and is not beyond a state's control if its purpose is "counter to valid state policy in a domain open to state regulation." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 291 (1957).

This Court has declared that its role in these cases is to review the balance struck by state courts between the interests of those picketing and the competing interests of state policy. *Vogt*, 354 U.S. at 290. While Alabama's judgment on striking such a balance is subject to the limitations of the Fourteenth Amendment, it comes to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475. The Court should not seek to assess the wisdom of Alabama's policy (*Carpenters & Joiners Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942)); its inquiry is whether the State of Alabama "has struck a balance so inconsistent with rooted tra-

ditions of a free people that it must be found an unconstitutional choice." *Hanke*, 339 U.S. at 479.

This Court has held in analogous cases that it is constitutionally permissible for a state to prohibit picketing for the purpose of interfering with the state's public facilities. *Cox v. Louisiana*, 379 U.S. 559 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). Here the Alabama court sustained the temporary injunction on evidence that an aim of the picketing was to "shut the whole State Docks down (to foreign shipping) ..." (App. 130a). Since the Alabama State Docks is owned and operated by the state for the benefit and use of its citizens, Alabama courts could constitutionally determine that the overriding interests of the citizens of Alabama in keeping open the state's public facility justified the temporary restraining of Petitioners' picketing.

Moreover, the Alabama courts could permissibly determine that such picketing would be "so detrimental .. to the citizenry ... as dependent on goods carried in foreign bottoms as is ours" (*Windward*, 39 L.Ed.2d at 202), that Alabama's substantial social and economic interest in the free flow of foreign commerce through its only seaport outweighed the interest of Petitioners to cause longshoremen to boycott foreign ships because the wages paid to crewmen on those ships were less than wages paid to American seamen.

ARGUMENT

I.

The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing of Foreign-Flag Vessels In The Port of Mobile

Despite the Court's decision earlier this year in *Windward Shipping (London) Ltd. v. American Radio Association*, ____ U.S. ____, 94 S. Ct. 959 (1974), Petitioners argue that the jurisdiction of the Alabama state courts to enjoin Petitioners' picketing was pre-empted by the exclusive jurisdiction of the National Labor Relations Board. In *Windward* the Court held that the jurisdiction of Texas state courts over identical picketing was not pre-empted by the NLRB because the picketing interfered with the maritime operations of foreign vessels and, therefore, was not "in commerce" within the meaning of the National Labor Relations Act.

Petitioners attempt to distinguish *Windward* from the case at bar on two bases. One attempted distinction is contained in footnote five of Petitioners' brief wherein they argue that the rationale of *Windward* was limited to picketing of foreign-owned, foreign-flag vessels and left open the pre-emption question with respect to American-owned, foreign-flag vessels "flying Panamanian, Liberian or Honduran flags." Since *Windward* in fact involved picketing of Liberian-flag vessels and since the picketing by Petitioners in this case was planned to be directed against *all* foreign-

flag vessels in the Port, regardless of ownership,* and was in fact directed to English and Philippine vessels for approximately two days, Petitioners' claimed distinction is not supported in fact. Even if there were factual support for Petitioners' claimed distinction, the Court has considered and rejected the same argument in *McCulloch v. Marineros de Hondurus*, 372 U.S. 10 (1963). In that case, the Court held that the National Labor Relations Board improperly assumed jurisdiction to order an election involving foreign crews of foreign-flag ships. It was argued, as Petitioners argue here, that the factual situation in *McCulloch* was different than the Court had considered six years earlier in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), because *Benz* involved a foreign-owned ship, whereas the vessel in *McCulloch* was effectively American-owned. There the NLRB argued that under its "balancing of contacts" theory there were sufficient American contacts to give it jurisdiction. The Court rejected that argument stating:

> "But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturb-

*The unions' witness, Mr. Neira, testified: "[w]e were going out and strike every foreign-flag ship in the Port of Mobile" (App. 107a). He also testified that he received instructions to picket "all foreign flag ships" ("every one") within his resources (App. 123a, 124a, 126a), although the picketing was later limited to vessels with crews different from the flag of the vessel. There is nothing in the record which indicates that any of the vessels picketed were American owned.

> ance not only in the field of maritime law, but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore, appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19.

As the Court held in *McCulloch*, the basic question is not who owns the vessels, but whether the ships are "foreign registered vessels employing alien seamen." It is uncontroverted in the present case that the vessels picketed by Petitioners were foreign registered vessels employing alien seamen. Thus, Petitioners' argued distinction is not only unsupported factually, it has no legal justification.

The gist of Petitioners' second attempted distinction between *Windward* and the case at bar is that because this suit was filed by American stevedores, and not foreign shipowners, the dispute is between American parties and is "in commerce" within the meaning of the National Labor Relations Act.* Petitioners mis-

*Both the Petitioners and the AFL-CIO, as *amicus*, seem willing to concede that Petitioners' conduct may have violated the National Labor Relations Act. Yet they also argue that the Fourteenth Amendment prohibits the State of Alabama from

read *Windward*. The *ratio decidendi* of *Windward* was that because the picketing interfered with the maritime operations of foreign-flag vessels, the picketing was not "in commerce" and did not come within the jurisdiction of the National Labor Relations Board. It was not crucial in *Windward* that injunctive relief was sought by the foreign shipowners whose ships could not be loaded or unloaded, rather than the American stevedores who were responsible for the loading and unloading of the vessels. Certainly the American stevedores have been injured by Petitioners' conduct even though the picketing was directed at the foreign vessels. The stevedore so injured has the right to seek legal redress for the tort committed, and the Alabama Supreme Court so recognized (App. 26a). See also *Fruit Dispatch Co. v. National Maritime Union*, 138 So.2d 853 (1962).

Nor is *Local Union No. 25 v. New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155 (1956) ("the *Piggyback* case"), which was cited by Petitioners, supportive of their position. In that case a railroad, whose labor relations were regulated by the Railway Labor Act, obtained a state court injunction against picketing by the Teamsters Union who protested trucking companies "piggybacking" truck trailers on railroad cars.

---

regulating the same conduct. As discussed above, we believe that the Court in *Windward* foreclosed any notion that the NLRB has jurisdiction. Thus, since the same constitutional limitations apply to Congress as to the states, Local 501, *IBEW v. NLRB*, 341 U. S. 694 (1951), the claims of NLRB proscription advanced in support of Petitioners' pre-emption arguments do no more than demonstrate the weakness in Petitioners' constitutional arguments.

The railroad was exempt from the definition of "employer" in the National Labor Relations Act; however, the Court held that the railroad was not precluded from seeking relief from the NLRB and that state court jurisdiction was pre-empted. Petitioners argue that the *Piggyback* case is authority for the proposition that the NLRB has exclusive jurisdiction over picketing they say is allegedly violative of §8(b)(4) of the Act, even though the picketing is directed at parties whose employer-employee relations are not subject to the Act's coverage.

In *Incres Steamship Co. v. Maritime Workers Union*, 372 U.S. 24 (1963), the Court considered the *Piggyback* decision, pointing out that it was fundamental to the decision that the action was brought by the railroad under "circumstances unrelated to its employer-employee relations" in a situation where the union "was in no way concerned with [the railroad's] labor policy." 372 U.S. at 27.

In the case at bar, contrary to the situation in the *Piggyback* case, and very much like that in *Incres*, the Petitioners' picketing is vitally concerned with the carrier's labor policy in circumstances directly related to its "employer-employee relations." Here the picketing was to protest "substandard" wages paid to the crews of the foreign-flag vessels picketed; wages which were set by the ships' articles of agreement. Thus, Petitioners' picketing directly concerned the vessels' "employer-employee relations" and its "labor policy," in sharp contrast to the picketing in the *Piggyback* case. Consequently, the *Piggyback* rationale

does not apply here to deprive the state courts of jurisdiction to enjoin Petitioners' tortious conduct.

Petitioners' reliance on *Grain Elevator Workers v. NLRB*, 376 F.2d 774 (D.C. Cir. 1967) and *Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied* 379 U.S. 967 (1965), is misplaced. Both cases arose as a result of a work stoppage by employees "working in a domestic plant of [an] American employer" (334 F.2d at 1019) and directed against the American employer in the absence of any picketing of foreign vessels. Neither case dealt with the right of American unions to picket foreign-flag vessels for the intended purpose of imposing American wages and working conditions and/or requiring the hiring of American seamen at American wages and conditions as a condition precedent to unimpeded access to United States ports. In both cases the courts concluded that the concerted activities of the employees did not interfere with the internal affairs of the vessels involved and did affect the "interstate movement of grain" and, thus, interstate commerce. 334 F.2d at 1019 and 376 F.2d at 776. Contrariwise, picketing of the type under consideration here was held by the Court in *Windward* to interfere with the internal affairs of the vessels picketed and, thus, not to be "in commerce" within the meaning of the National Labor Relations Act.

In arguing that the instant fact situation is distinguishable from that in *Windward*, Petitioners would have the Court grant them what was denied

them in the former case, to-wit: NLRB review of picketing which interferes with the maritime operations of foreign-flag vessels. They seek to gain through indirect means what was denied to them in *Windward*. Acceptance of Petitioners' argument would mean that the forum would depend on the identity of the party complaining of the activity in question. That is, a foreign shipowner would seek redress in state courts whereas the American stevedore would be relegated to the National Labor Relations Board.

II.
The Constitutional Question Should Not Be Decided In The Absence Of A Final Judgment

This case comes to the Court for review of an interlocutory order of the Circuit Court of Mobile County, Alabama. Thus, as a threshold issue the Court must decide if that order is a "final judgment or decree" subject to review under 28 U.S.C. §1257. The importance of the issue is intensified by the constitutional question raised by Petitioners.

Much of what Petitioners urge in support of their contention that their picketing activities were protected by the First and Fourteenth Amendments rests upon their claim that the Alabama Courts gave too much emphasis to the testimony of Louis Neira concerning the purpose of the picketing (Pet. brief at 24-26). They contend that the erroneous resolution of this disputed issue, viz: the purpose or object of the picketing, requires reversal. Of course, Petitioners' argument ignores the fact that Mr. Neira was the only witness

called by them to testify on their behalf and that it was Mr. Neira whose affidavit was introduced in an effort to prove other factual contentions advanced by Petitioners. Aside from the issue of whether or not the Petitioners should thus be bound by Mr. Neira's testimony, or what significance it should be given, such evidentiary issues are better left for review following a hearing on the merits.

The Alabama Supreme Court emphasized in its review of this temporary injunction that "a substantial question remained to be decided" in the case (App. 22a). It concluded:

> "... This situation called on the trial judge to exercise his discretion as to whether or not to grant a temporary injunction to maintain the status quo until a full hearing could be had before the court on the merits of the case. In his decision, he did not, in our opinion, abuse his discretion. We find no error in the trial judge's granting the writ of temporary injunction." App. 26a.

Under Alabama law, it is not the purpose of a temporary injunction to decide the merits of the case (App. 22a). As was stated in *Berman v. Wreck-A-Pair Co.*, 234 Ala. 293, 298, 175 So. 269, 274 (1937):

> "Such an injunction does not depend on any advance finding for complainant on the merits. If, upon consideration of the bill, exhibits, supporting affidavits and evidence, also the answer, exhibits, supporting affidavits and evidence on the part of respondent, it shall reasonably appear that balancing inconvenience, probable injury, and making effective the relief sought, it is found advisable to preserve the status quo, such an injunction may and should be granted. Rather wide discretion is given the trial court in this regard."

Thus, in its present posture, the case at bar lacks the finality requisite for this Court's review. It is in the same posture as was *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952), and *Taggert v. Weinacker's Inc.*, 397 U.S. 223 (1970), two Alabama cases in which writs of certiorari requesting review of temporary injunction orders were dismissed as having been improvidently granted because the orders lacked finality. *See also AFL v. Swing*, 309 U.S. 659 (1940), in which this Court denied certiorari after the temporary injunction issued, but subsequently granted certiorari after the permanent injunction issued.

The present case is markedly different from *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), where the Court reviewed a preliminary injunction which issued after a full hearing and which was accompanied by detailed findings of fact by the trial court. *See Keefe v. Organization for a Better Austin*, 115 Ill. App.2d 236, 253 N.E.2d 76, 78-79 (1969). In *Keefe*, the Court observed:

> "We see nothing in the record that would indicate that the Illinois courts applied a less vigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." 402 U.S. at 418, n. 1 (citation omitted).

In contrast to the situation in *Keefe*, the case *sub judice* was reviewed by the Alabama Supreme Court using a lesser standard than it would use to review the granting of a permanent injunction. Compare *Parker v. Ebsco Industries, Inc.*, 282 Ala. 98, 209 So.2d 383 (1968), and *Poyner v. Whiddon*, 234 Ala. 168, 174 So. 507 (1937). The temporary injunction granted by the trial court was approved "to maintain the status quo until a full hearing could be had before the court on the merits of the case" (App. 26a), when a "substantial question" would have to be decided (App. 23a). Thus, it is apparent that unlike the situation in *Keefe* where "the issuance of a permanent injunction ... [would] be little more than a formality" (402 U.S. at 418, n. 1), issuance of a permanent injunction in the present case is far from a foregone conclusion. Petitioners' factual arguments concerning the purposes of their picketing and the significance of Mr. Neira's testimony remain to be finally resolved after a full

evidentiary hearing. Resolution of the constitutional issue should come only after such final resolution of these factual issues.

III.

Petitioners' Picketing For The Purpose of Shutting Down Alabama's Public Port Facility To Foreign Shipping Provided The Alabama Court With A Constitutionally Permissible Base For Enjoining Such Picketing.

Discussion of the constitutional protection given picketing must begin with *Thornhill v. Alabama*, 310 U.S. 88 (1940). There the Court held unconstitutional an Alabama statute which prohibited all picketing near the premises of an employer involved in a labor dispute. The Court was not called upon to determine the legality of the picketing. It merely had to determine the constitutionality of the statute which had been construed as proscribing all picketing, regardless of where, why, or how it was conducted. Although the holding in *Thornhill* did condemn state bans of all picketing, it did not prohibit every restraint of picketing. Indeed, the Court observed that it was the "power and the duty" of a state to "preserve the peace and to protect the privacy, the lives, and the property of its residents," but that those interests of the community must be balanced against the interest of individuals in freedom of discussion on matters of public concern. 310 U.S. at 105. The vice of the sweeping Alabama statute which banned all picketing was that it did not evidence "such care in balancing these interests" as was constitutionally required. *Ibid.*

Although the Court used broad language in *Thornhill*, the Court's subsequent limitations on this language have been so substantial so as to cause a minority of the Court in 1957 to complain that since *Thornhill*, "The Court has now come full circle... The retreat began in *(Hanke, infra)* . . . Today, the Court signs the formal surrender." *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 295-97 (1957).

In rendering the Court's decision in *Vogt*, Justice Frankfurter carefully traced the evolution of the concept that states can enjoin picketing in violation of a valid public policy of the state. Noting the broad pronouncements in *Thornhill*, which seemed to elevate peaceful picketing to the level of freedom of speech, he observed:

> "Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated.
>
> ....
>
> "The implied reassessments of the broad language of the *Thornhill* case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation." 354 U.S. at 289, 291.

Justice Frankfurter noted that "decisive reconsiderations" came in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) and observed that cases subsequent to *Thornhill* "made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." *Ibid.* The Court recognized that picketing often conflicts with other legitimate interests which the states have a right to protect:

> "[The cases after *Thornhill*] demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the *balance* struck by a State between picketing that involved more than 'publicity' and competing interests of state policy.
>
> ....
>
> "[The cases after *Thornhill*] established a broad field in which a state, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 290, 293 (emphasis added).

One of the cases to which Justice Frankfurter referred in *Vogt* was *Hughes v. Superior Court*, 339 U.S. 460 (1950). There, the Supreme Court in a unanimous opinion held a California state court had properly enjoined picketing in violation of a valid state policy. The Court, in rejecting the claim that the picketing

was constitutionally protected free speech, spoke in very clear terms:

> "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use....
>
> ....
>
> " . . . It has been amply recognized tha picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the *manner* in which picketing is conducted or the *purpose* which it seeks to effectuate gives ground for its disallowance." 339 U.S. at 464-66 (emphasis added).

The Court's reluctance to equate picketing with speech rests upon the Court's recognition that it involves more than communication. In *Hughes*, 339 U.S. at 464-65, the Court approvingly cited Justice Douglas' concurring opinion in *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942) to this effect:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 315 U.S. at 776.

The Court has also noted that although "picketing has an ingredient of communication, it cannot dogmatically be equated with the constitutionally protected [free] speech." "Our decisions" said the Court, "reflect recognition that picketing is 'indeed a hybrid.' " *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950). In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) the Court observed:

> "[P]icketing involves elements of both speech and conduct, i.e., patrolling, ... and because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." 391 U.S. at 313.

As vividly demonstrated by the record here, picketing by organized labor involves much more than communication. A union picket line is ordinarily a boycott signal which triggers work refusals by other organized workers when it is located in the path of such workers providing supplies or services to the target employer, irrespective of the contents of the picket signs. As stated by Professor Thomas Emerson in his book, *The System of Freedom of Expression:*

> ". . . [T]here is a fundamenetal difference between most labor picketing and most non-labor picketing. Labor picketing normally has a special kind of economic impact, derived from its institutional setting. An employer who is picketed is usually sealed off from many eco-

nomic contacts by the tradition that union labor will not cross the picket line. This form of pressure is applied by closely knit, powerful organizations, with membership in the thousands or hundreds of thousands and a nationwide network of affiliates. It is supported by a system of power based upon common economic interests, loyalties, social pressures, economic sanctions, and bureaucratic force. A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage, based upon an already prepared position. As such it must, under ordinary circumstances, be classified as action, rather than expression." T. Emerson, *The System of Freedom of Expression* 445 (1970).

Indeed, Congress has recognized that union picketing is often a signal to other groups of organized workers to refuse to cross the picket line, rather than an effort to inform members of the public. Professor Archibald Cox, who worked with the Senate Labor Committee Chairman on the Section 8(b)(7) amendment to the Taft-Hartley Act, has said:

"Picketing before a union election is divided by Section 8(b)(7) into two categories: (1) picketing which halts pick-ups or deliveries by independent trucking concerns or the rendition of services by the employees of other employers, and (2) picketing which appeals only to employees in the establishment and members

of the public.... The theory is that the former class of picketing is essentially a signal to organized economic action backed by group discipline. Such economic pressure, if continued, causes heavy loss and increases the likelihood of the employer's coercing the employees to join the union. In the second type of picketing, the elements of communication predominate. If the employer loses patronage, it is chiefly because of the impact of the picket's message upon members of the public acting as individuals." *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. R. 257 (1960).

This construction has been given judicial approval. In *NLRB v. Local 3, IBEW*, 317 F.2d 193 (2nd Cir. 1963), the court discussed the proviso in Section 8(b)(7)(C) of the Act as follows:

"This proviso gives the union freedom to appeal to the unorganized public for spontaneous popular pressure upon an employer; it is intended, however, to exclude the invocation of pressure by labor groups or members of unions, as such.

The permissible picketing is, therefore, that which through the dissemination of certain allowed representations, is designed to influence members of the unorganized public, as individuals, because the impact upon the employer

by way of such individuals is weaker, more indirect and less coercive.

....

. . . In its context the . . . proviso means in terms of 'signal' and 'publicity' picketing that while most picketing with a 'signaling' purpose is proscribed, most picketing for publicity is protected....

....

The Board must, therefore, approach its conclusion as to whether or not the picketing was 'for the purpose of truthfully advising the public' by way of a finding of whether or not the union's tactical purpose was to signal economic action, backed by organized group discipline," 317 F.2d at 198-200.*

Although the Petitioners assert in their brief that their picketing was nothing more than an appeal to the public to "ship American," it seems obvious that the picketing was intended and designed as a "signal" to stop loading and unloading the vessels picketed. Mr. Neira admitted that no thought was given to timing the picketing so that it would not interfere with the longshoremen's call-out time (App. 127a). Indeed, questioning of Mr. Neira as to why the pickets were not placed so that they did not interfere with the longshoremen prompted Petitioners' counsel to remark:

*In subsequent proceedings the Second Circuit specifically considered the free speech question and concluded that proscription of signal picketing does not violate the First Amendment. *NLRB v. Local 3, IBEW*, 339 F.2d 600 (2nd Cir. 1964).

"Your Honor, this shows an incredible ignorance of what a picket line is supposed to do." (App. 128a).

Mr. Neira admitted that it is "definite" that most Union men don't cross picket lines (App. 116a) and his counsel said that, "based upon past practice of the longshoremen to not cross picket lines," the Petitioners "fully expected" longshoremen not to cross their lines (App. 117a, 118a). As the Petitioners most certainly knew, it did not matter what their picket signs said, the nature of waterfront life is such that picket lines are to be honored, particularly where they are established by affiliated unions.

Surely, the foregoing evidence, when considered in light of the initiation of the picketing at a time which coincided with the court ordered return to work by longshoremen, belies any claim that the picketing had purely "informational" aims. If the Petitioners wish to argue otherwise, a more complete record could perhaps enable them to do so. At this stage, however, their claims ring hollow. Accordingly, Petitioners' reliance on this Court's decision in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) is misplaced. In that case, the Court held that the state's trespass laws could not be applied in such a way as to prevent the communication of ideas to the patrons of a supermarket. The picketing in that case took place in the parcel pick-up area frequented by customers and its sole purpose was to ask customers not to patronize the store. Nothing in the opinion suggests that the picketing was intended to or that

it did interfere with services provided by union labor to the store. It was not a signal to organized labor to cease performing services for or making deliveries to the store.

It was initially noted in *Thornhill* that a state's regulation of picketing required a "balancing" of competing interests. 310 U.S. at 105. Indeed, in *Vogt*, the Court observed that the cases which followed involved "not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy." 354 U.S. at 290.

Recognition of the necessity of the "balancing of competing interests" was succinctly stated in *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950), when the Court observed:

> "[W]e must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' (citation omitted) The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U.S. 88, 104, 84 L.Ed. 1093, 1103, 60 S. Ct. 736. A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a state's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect. 339 U.S. at 474-75.

In *Hanke*, the union picketed in protest that two self-employed car dealers were keeping their businesses open beyond the hours which the union had negotiated with other car dealers. Similarly, the unions here were picketing to protest that the wages paid to foreign crews on foreign ships were less than those negotiated by the union with the owners of American ships. The picketing in *Hanke* was peaceful, but it triggered a refusal by drivers for supply houses to deliver parts and other needed material to the car dealers.

The Court considered the interplay of social-economic interests: "Unions obvicusly are concerned not to have union standards undermined by non-union ships." *Id.* at 475. On the other hand there was an interest in preserving the economic units against whom the picketing was directed.

> "Whether to prefer the union or a self-employer in such a situation, or seek partial recognition of both interests, and, if so, by what means

> to secure such accommodation, obviously presents to a state serious problems. There are no sure answers and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of [the *Senn* case]." *Id.* at 475-476.

The Court held:

> "... we cannot concude that [the state], in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that [the state] has offended the Constitution." *Id.* at 478-79.

Here, the ban on Petitioners' picketing followed a judicial inquiry into its conduct and purposes. There was no blanket prohibition on picketing, rather, the injunction was given only after an adversary hearing before the state trial court. This injunction was reviewed and sustained by the Supreme Court of Alabama. This Court is called upon to review the balance struck by the courts of Alabama between the interest

of those picketing and competing interests of state policy.* *Vogt*, 354 U.S. at 290. While, naturally, Ala-

---

*The failure of the trial judge to enter factual findings to support his order awarding interlocutory relief to Respondents does not, as Petitioners contend, provide this Court with a basis for inferring that there were no valid policies supporting issuance of the temporary injunction. The rules of practice in Alabama at the time did not require the entry of such findings. *See Loftin v. Parker*, 253 Ala. 98, 42 So.2d 824 (1949). Title 7, §1056 of the Alabama Code (1958) was the only statute which specifically referred to the trial court's obligations on issuing an order granting such an injunction and it required only that the judge "endorse upon the bill (of complaint) his fiat to that effect . . ."

Since the entry of the order in question, Alabama has adopted rules of civil procedure patterned after the Federal Rules of Civil Procedure; but unlike the Feders' Rules, the entry of findings in ruling on interlocutory relief is discretionary and not mandatory. Rule 52. *Ala. Rules of Ct.* In 2 Lyons, *Alabama Practice* (1973), the author, who was the official reporter for the Advisory Committee which formulated the Alabama rules, summarizes the pertinent provisions of the current rules and offers his opinion as to why the rules do not require issuance of findings:

> "This rule departs from the federal version in that findings of fact and conclusions of law are not mandatory unless required by statute. Any party may request findings and conclusions but the allowance of the request is entirely in the court's discretion. Required findings will perhaps have to await the day when the necessary supportive personnel are available to the bench." 2 Lyons, *Alabama Practice* 52.2 (1973

Finally, we know of no decision by this Court which holds that the failure of a state trial court to make findings impairs the validity of its order. Indeed, in *Teamsters Local 695 v. Vogt*, 354 U. S. 284 (1957), the trial court had refused to make certain requested findings concerning the purpose of picketing sought to be enjoined. Nevertheless, the Wisconsin Supreme Court made such findings based upon the record below and, on the basis of such findings, held that the picketing was properly enjoined. This Court, noting that the purpose of the picketing in question had been inferred from the record by the Wisconsin Supreme Court rather than found by the trial court, concluded that "the circumstances set forth in the opinion of the Wisconsin Supreme Court afforded a rational basis for the

bama's judgment on striking such a balance is subject to the limitations of the Fourteenth Amendment, it comes to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475. In *Carpenters & Joiners Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942), which involved the review of an injunction issued by Texas state courts, the Court placed the following self-imposed limitation on its review of state policies which would support the enjoining of peaceful picketing:

> "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law." 315 U.S. at 728.

The question is whether the State of Alabama "has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." *Hanke*, 339 U.S. at 479.

Petitioners' picketing was restrained pursuant to the Alabama doctrine, well established at common law, against unlawful interference with the business of another. *See, e.g., Dorchy v. Kansas*, 272 U.S. 306 (1926); *Thompson v. Allstate Insurance Co.*, 476 F.2d 746 (5th Cir. 1973); and *Pennington v. Birmingham Baseball Club* 277 Ala. 336, 170 So.2d 410 (1964).

---

inference it drew concerning the purpose of the picketing" 354 U. S. at 295, and provided a sufficient basis upon which an injunction could be issued by the court.

> "[T]he right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected if necessary, by injunctive process." (App. 20a, quoting *Pennington, supra*).

Without question, Petitioners' picketing interferred with Respondents' businesses. The Alabama Supreme Court found sufficient evidence in the record to conclude that such picketing was designed to interfere with the operations of the Alabama State Docks and to close the Port of Mobile to foreign shipping. Since such interference was an intended purpose or objective of Petitioners' picketing, and not just an incidental effect thereof, their activity controvened policies of the State and was unlawful. Hence, Petitioners' picketing was both "unlawful" and an "interference" with Respondents' businesses and was properly restrained temporarily until a full hearing could be had on the permanent injunction.

Obviously, Petitioners' picketing were more than a mere publication of the fact that American seamen were losing jobs to foreign shipping. The Petitioners' "appeal" was not directed to the public not to patronize the shippers; it was a "signal" to other unionized workers to refuse to load or unload the ships. The picketing was done in such a manner that, coupled with established union policies and traditions, it resulted in longshoremen, members of a sister union, refusing to work. As the Alabama Supreme Court noted, there was ample evidence from which to conclude that the purpose of the picketing was to close

the Alabama State Docks to all foreign shipping (App. 25a, 26a).

Surely, it is well within the constitutional power of the states to determine that its interests in providing foreign vessels free access to its port facilities with the consequent benefit to all of its citizens outweighs the interests of Petitioners to close the port to such shipping because the wages paid to foreign crewmen on such ships are less than they are paid. This is particularly so where, as here, such port facilities are owned and operated by the state.*

In analogous situations this Court has recognized that persons can be constitutionally prohibited from picketing for the purpose of intentionally interfering with the normal operations of public facilities. Its holdings in this area were summarized in *Amalgamated*

*Authority for the establishment of the Alabama State Docks was first provided by Amendment 12 to the Constitution of Alabama. By that amendment, the state was authorized to appropriate funds and engage "in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating all harbors and seaports within the state or its jurisdiction, provided, that such work or improvement shall always be and remain under the management and control of the state, through its State Harbor Commission, or other governing agency." In 1957, Amendment 116 to the Alabama Constitution provided that the state could incur an indebtedness for the "promoting, developing, constructing, maintaining and operating along navigable streams or waterways . . . all manner of docks, facilities, elevators . . . and improvements needful for the convenient use of the same, in aid of commerce and use of the waterways of the state . . ." Chapters 1-A through 1-L of Title 38 of the *Alabama Code* (1958) contain an exhaustive legislative provision for the development and operation of the port facilities by the State of Alabama.

Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), as follows:

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the state. Thus we have upheld a statute prohibiting picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any ... county ... courthouses.' (citation omitted.) Likewise it has been indicated that persons could be constitutionally prohibited from picketing 'in or near' a court 'with the intent of interfering with, obstructing, or impeding the administration of justice.' (citation omitted.)
>
> In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it." 391 U.S. at 320, 321.

One of the cases the Court had reference to was *Adderley v. Florida*, 385 U.S. 39 (1966), where it was held that the state could prohibit demonstrations on jail grounds:

> "The state, no less than a private owner of property, has power to preserve the property

> under its control for the use to which it is lawfully dedicated ... The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose." 385 U.S. at 47, 48.

See, also, *Cox v. Louisiana*, 379 U.S. 559 (1965), where the Court upheld a statute totally barring demonstrations near courthouses.

Here an admitted aim of Petitioners' picketing was to "shut the whole State Docks down (to foreign shipping) . . ." (App. 130a). Petitioners' activities to that end thus came into collision with the interests of the citizens of Alabama in the unimpaired operation of the State Docks. In striking the balance that it did, we submit that the state was acting well within the constitutional authority granted it.

As a corollary to the state's interest in halting intentional interference with its public port facilities, Alabama certainly has substantial social and economic interests in the free flow of foreign commerce through its port. The judgment of the state courts in giving more weight to such interests than to the interest of American unions to cause foreign ships to be boycotted by longshoremen because the wages paid to crewmen on those ships are less than those paid to American seamen, should come to this Court "bearing a weighty title of respect." *Hanke*, 339 U.S. at 475.

Indeed, there have been several cases before this Court in which other courts have struck the same

balance. *Incres Steamship Co. v. Maritime Workers Union*, 372 U.S. 24 (1963); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957). Although the constitutional question was not decided by the Court in those cases, the lower court decisions demonstrate the widely recognized view that intentional interference with foreign shipping is tortious and may be properly enjoined. Similar results were reached in *Upper Lakes Shipping v. S.I.U.*, 18 Wis. 2d 646, 119 N.W.2d 426 (1963) and *Fruit Dispatch Co. v National Maritime Union*, 138 So.2d 853 (La. App. 1962).

The Petitioners may contend here that this case is different from the cited cases because Petitioners are not seeking to represent or organize the foreign seamen employed on foreign-flag ships *(Incres)* nor are they seeking to help them in a dispute which those foreign seamen have with their employer *(Benz)*, Petitioners may claim that since there is no direct interference with the relationship between the foreign employer and the foreign crewmen, their picketing is not tortious. But that argument ignores the fact that the pickets carried signs protesting the low wages paid by the foreign shipowners to their crew. Taking the unions at their word, an immediate objective of the picketing must have been to force the foreign shipowners to pay higher wages and benefits to their crewmen than were required by the foreign articles or negotiated by their foreign unions. In fact, Mr. Neira admitted during

cross-examination that reaction by the foreign crews of the vessels was an object of the picketing:

(App., 13a, 139a)

"Q. ... And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?

A. That would be nice.

....

Q. ... But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seamen, that's what you want, isn't it, Mr. Neira?

A. Yes, sir."

This is precisely the objective that the unions pursued in *Benz* and *Incres*. That the unions are trying to achieve their objective from the dockside, as it were, rather than by representation of crewmen, hardly lessens the impact on the foreign-flag ships. This impact and the likely result of the picketing were discussed by the Court in *Windward* as follows:

"The picket signs utilized at the docks where the *Northwind* and *Theomana* were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United

States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the 'maritime operations' of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports....

"In this situation, the foreign vessel's lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacer-

bate and broaden the present dispute." 39 L.Ed.2d at 202.

In *Windward*, the Court concluded by noting that none of the predictable responses of the foreign-flag shipowners would provide any wage benefits to Petitioners' members. Similarly, there are virtually no responses available to American shippers and consignees and, indeed, the American public which could alleviate the conditions which gave rise to the picketing. There is nothing a stevedoring company, or a ship's agent, or the public can do except appeal to Congress for the initiation of some sort of long-range project to provide relief to the American seamen who, presumably, claim the power to determine the adequacy of such relief.

Petitioners claim they were justified in inflicting severe economic loss on persons having no control over their complaints so that they could prompt action in Washington, yet only a year or so prior the entire question had been given close attention by Congress, which had taken positive action to deal with the problem on a broad scale. In 1970 a greatly expanded program for aiding the American merchant marine was enacted as the Merchant Marine Act of 1970, P.S. 91-469, 84 Stat. 1018 (1970).

In enacting this new maritime program, Congress recognized that "[i]n general, merchant ships of the world trade internationally in accordance with prin-

ciples of freedom of the seas and open ports,"* and embarked on an extensive program designed to make American ships competitive with foreign ships. This program includes direct subsidies to American shipowners to make up the difference in the costs of operating United States-flag and foreign-flag vessels, construction subsidies to make up the difference between ship construction costs in the United States and abroad, and important special tax benefits.

Congress presumably could have legislated as part of the Merchant Marine Act of 1970 that, in order to make American-flag ships competitive with foreign-flag ships, only those foreign-flag ships whose crews are paid at American wage levels would be permitted to carry cargo to or from American ports. It did not do so. Nevertheless, Petitioners are urging that this Court accord to them a federally protected power to utilize picketing to bar foreign ships from trading in and out of our ports when in their unilateral opinion such action would further their own interests.

Petitioners have decided that the wages and working conditions of foreign seamen working on foreign vessels under foreign contracts usually negotiated by foreign unions and executed in foreign countries under their labor relations acts are "substandard." They propose to dictate to the world minimum standards of wages and working conditions which must be met before ships will be allowed to use the ports of the United

*S. Rep. No. 91-1080, 91st Cong., 2d Sess., U.S Code Cong. & Ad. News at 4190 (1970)

States. There is no doubt that the Petitioners, unless restrained, have the raw power to accomplish just that. It is a fact of waterfront life that picket lines will not be crossed. The actions of the Petitioners were intended and designed to bring an end to the free and effective access of ships of friendly foreign governments to the Port of Mobile, and other ports of this country, thereby bringing a total disruption of foreign commerce. Such action is "so detrimental ... to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours"* that its restraint was all but mandated. A balance struck any differently by the courts of Alabama would ignore the interests of all but Petitioners.

CONCLUSION

For the foregoing reasons, the granting of the interlocutory order should be affirmed and the case remanded for further proceedings. This Court should not decide the constitutional question until such time as there is a final judgment and the Supreme Court of Alabama has had opportunity to review such judgment. If the Court decides the constitutional question, there is adequate evidence in the record that the picketing was for a purpose which conflicted with valid state policies and that the Alabama state courts

*_Windward_, 39 L.Ed.2d at 195

struck a constitutionally appropriate balance in weighing those interests against the interests of Petitioners.

Respectfully submitted,

Frank McRight
Kirk C. Shaw
Counsel for Respondent
Mobile Steamship Association

OF COUNSEL:
Armbrecht, Jackson & DeMouy
Mobile, Alabama

CERTIFICATE OF SERVICE

I, Frank McRight, one of the attorneys for Respondent Mobile Steamship Association, do hereby certify that on this ____ day of August, 1974, three copies of the foregoing brief were served on all parties required to be served by mailing the same through the United States mail, postage prepaid, to the following attorneys of record:

Howard Schulman, Esq.
Schulman, Abarbanel and Schlesinger
1250 Broadway
New York, New York 10001
and
Otto E. Simon, Esq.
Simon and Wood
1010 Van Antwerp Building
Mobile, Alabama 36602
Attorneys for Petitioners

Alex F. Lankford, Esq.
Hand, Arendall, Bedsole, Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601
Attorneys for Respondent Robert E. Malone

Frank McRight

Supreme Court, U. S.
FILED
AUG 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT ROBERT E. MALONE

Alex F. Lankford, III
Attorney for Respondent
Robert E. Malone
3000 First National Bank
Building
Mobile, Alabama 36602

OF COUNSEL:
HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
MOBILE, ALABAMA

INDEX

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved .. 2

Questions Presented 3

Statement of the Case 4

Argument

I. The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing Of Foreign-Flag Vessels In Mobile And Was Not Pre-empted From Doing So By The NLRA 16

II. Petitioners' Picketing Is Not Constitutionally Protected And Was Properly Enjoined 20

Conclusion 32

TABLE OF AUTHORITIES

CASES:

Adderly v. Florida, 385 U.S. 39 ..... 23, 30

American Radio Association, et als v. Mobile Steamship Association, 483 F.2d 1 15

Baggett Transportation Co. v. Local No. 261, etc. 259 Ala. 19, 65 So.2d 506 26

Bakery & P. Drivers & Helpers v. Wohl, 315 U.S. 769 ..... 22, 23

Benz v. Compania Naviera Hildago, 353 U.S. 138 ..... 16, 17, 20

Cameron v. Johnson, 390 U.S. 611 23

Carpenter's & Joiners Union of America v. Ritter's Cafe, 315 U.S. 722 31

TABLE OF AUTHORITIES (Continued)

Page

Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383 27

Cox v. Louisiana, 379 U.S. 559 ..... 23, 30

Cox v. New Hampshire, 312 U.S. 569 23

Duplex Printing Press Co. v. Deering, 254 U.S. 443 30

Food Employees v. Logan Valley Plaza, 391 U.S. 308 ..... 22, 23, 31

Fruit Dispatch Co. v. NMU, La. App., 138 So.2d 853 ..... 19, 29

Giboney v. Empire Storage and Ice Co., 336 U.S. 490 22

Grain Elevator Workers Local 418 v. NLRB, (D.C.Cir.) 376 F.2d 774 18

Hughes v. Superior Court of California, 399 U.S. 460 ..... 22, 23

Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 18

International Brotherhood v. Vogt, 354 U.S. 284 ..... 21, 23, 31

International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 16

Loftin v. Parker, 253 Ala. 98, 42 So. 2d 824 20

Local No. 612, International Brotherhood of Teamsters v. Bowman Transportation, Inc., 276 Ala. 563, 165 So. 2d 113 26

TABLE OF AUTHORITIES (Continued)

Page

Local 761 v. NLRB, 366 U.S. 667 26

Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 18

McCulloch v. Sociedad Nacional, etc., 372 U.S. 10 .. 18, 20

Pennington v. Birmingham Baseball Club, Inc., 277 Ala. 336, 170 So.2d 410 28

Russell v. International Union, etc., 258 Ala. 615, 64 So.2d 384 26

Sparks v. McCrary, 156 Ala. 382, 47 So. 332 27

Teamsters Local 309 v. Hanke, 339 U.S. 470 32

Thornhill v. Alabama, 310 U.S. 88 ..... 23, 30

Traux v. Corrigan, 257 U.S. 312 30

Windward Shipping, etc., et al. v. American Radio Association, etc., et al., ____ U.S. ____, 94 S.Ct. 959, 39 L. Ed. 2d 195 .. 16. 17, 18, 19, 20

CONSTITUTION & STATUTES:

Labor Management Relations Act, as amended, 29 U.S.C. Sec. 141-187 2

Section 6 of Article 1 of the Constitution of Alabama 3, 26

Section 13 of Article 1 of the Constitution of Alabama 3

Fifth Amendment to the U.S. Constitution 2, 30

Title 38, Sec. 1(19), Code of Alabama (1958) 30

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

versus

MOBILE STEAMSHIP ASSOCIATION, INC. and
ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT ROBERT E. MALONE

OPINIONS BELOW

The opinion of the Supreme Court of Alabama dated May 3, 1973, affirming the granting of a temporary injunction by the Circuit Court of Mobile County, Alabama is reported at 279 So.2d 467, and is set forth at pages 5a-26a of Single Appendix. The denial by the Supreme Court of Alabama of petitioners' application for rehearing, dated July 5, 1973, is found at page 27a. The injunctive order of the Circuit Court of Mobile County, Alabama, dated November 11, 1971, is found at pages 28a-30a.

JURISDICTION

The jurisdiction of this Court is stated by petitioners to rest on 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant part of the Fifth Amendment to the U.S. Constitution is, as follows:

> "No person shall be ... deprived of life, liberty or property, without due process of law..."

Labor Management Relations Act, as amended, 29 U.S.C. Sec. 141-187.

> "The state, in engaging in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating habors, seaports and riverports within the state and its jurisdiction, acting through the department, shall have power to acquire, purchase, install, lease, construct, own, hold, maintain, equip, use, control and operate, at seaports, or at any ports located on any river or stream which is navigable for commercial traffic, or which may be made so navigable at any time in the future, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses and other water and rail terminals and other structures and facilities needful for the convenient use of the same in the aid of commerce...."

The pertinent part of Section 6 of Article 1 of the Constitution of Alabama, is as follows:

> "...and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law..." Ala. Code, Tit. 1 (1958), p.36.

Section 13 of such Constitutional Article 1, is, as follows:

> "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Ala. Code, Tit. 1 (1958), p.69.

QUESTIONS PRESENTED

Petitioners, maritime unions, picketed every foreign flag vessel in the Port of Mobile, protesting low wages and benefits paid crewmen aboard such vessels. Such picketing started soon after a Federal Judge had ordered back to work longshoremen members of a union affiliated with petitioners, the I.L.A., and at a time when harvesting of soybeans for export sale was at its height. Members of the I.L.A. refused to cross the picket lines set up by petitioners to load or discharge such foreign flag vessels, thereby shutting down the

entire Port and depriving respondent Malone and other farmers from harvesting and delivering their beans to the only available public export elevator. Respondent steamship members were also prevented from performing their agreements with such vessel owners to load and discharge such vessels. Petitioners appealed from the State Court order sought and obtained by respondents enjoining such picketing. The questions presented are:

1. Whether the State Court was correct in concluding that it had jurisdiction to hear the lawsuit to enjoin picketing by petitioners, American unions in a labor dispute with foreign-owned, foreign-flag ships manned by foreign crews represented by foreign unions.

2. Whether the State Court, upon finding that the picketing by petitioners has as one of its purposes unlawfully interferring with the rights of others to engage in a lawful occupation was against such state policy in a domain open to state regulation, violated petitioners' First and Fourteenth Amendments rights by granting a temporary injunction restraining said picketing which effectively shut down the Port of Mobile.

STATEMENT OF THE CASE

Petitioners' brief is so replete with omissions regarding a critical issue - the real intent, purpose and result of the pickets, as to require this respondent to present a Statement of the Case.

The Parties:

Petitioners are American maritime unions representing a substantial majority of American merchant seamen.

Petitioner Louis Neira is petitioner SIU's Port Agent and the person selected by petitioners' joint committee (92a) to put out the pickets in Mobile, give them instructions, in cooperation with the other union petitioners (142a-143a). Petitioner Master, Mates and Pilots is a division of the International Longshoreman's Association ("ILA").

Respondent Mobile Steamship Association is a non-profit corporation composed of members who are in the shipping business in the Port of Mobile, Alabama (67a). Included in its membership are stevedoring companies and agents representing steamship companies, foreign and U.S., whose vessels call at the Port. Respondent Robert E. Malone is a farmer who grows soybeans on rented land near Wilmer (Mobile County), Alabama (79a).

The Port of Mobile:

This Port is Alabama's only deep-water port. The Alabama State Docks Department ("Docks") owns and operates wharves, warehouses and a grain elevator for the use and benefit of the public. The Docks' grain elevator is the only public elevator in the area where farmers such as Malone can deliver and store their soybeans for export (77a, 79a-80a). Such elevator serves also as the only storage facility for soybeans

grown for export in South Alabama, Northwest Florida, East and Southeast Mississippi (44a).

On November 3, 1971, the Port of Mobile had at the Docks the following vessels (and their flag of registry): ILKON TAK (Liberian), AQUA GLORY (Liberian), BEL HUDSON (English) and PRESIDENT QUEZON (Phillipines) (96a).

The Picketing:

September 30, 1971, was the expiration date of the agreement between one of the petitioners' affiliated unions, the ILA and the employer bargaining agent, respondent Mobile Steamship Association. On October 1, 1971, the ILA commenced its strike against the Steamship Association. At this time, one of the foreign owned vessels in the Port was the BEL HUDSON, which arrived on October 1, 1971, under the elevator spouts at the Alabama State Docks ("Docks") ready to receive a cargo of soybeans (79a).

At the time of the ILA strike, soybean farmers in South Alabama, East and Southeast Mississippi and Northwest Florida had started to harvest their crops of beans to be sold and delivered at the Docks elevator, for export.

Strikes were also called in other Gulf ports by the ILA, but with less success than the efforts in Mobile. In Texas, the ports never stopped operating, as local ILA leaders refused to follow strike orders issued from the ILA International Headquarters in New York. In Louisiana, the National Labor Relations Board

("NLRB") secured an injunction under Sec. 10(1) of the National Labor Relations Act, compelling the longshoremen to return to work in the Port of New Orleans. At one point the Port of Mobile was the only major port on the Gulf Coast that was not working.

On November 3, 1971, the NLRB initiated efforts to secure a restraining order in the Port of Mobile pursuant to Sec.10(1) of the NLRA. At approximately 12:00 Noon on November 3, 1971, the Federal District Court in Mobile advised the parties that the temporary restraining order prayed for by the NLRB would issue against all ILA locals in the Port of Mobile (69a).

Almost simultaneously with the Federal Court's decision to enter the temporary restraining order, at about 12:10 p.m. on November 3rd, petitioners established a picket line at all gates of the Alabama State Docks, where vessels were berthed, (69a). These pickets were located at "every conceivable land surface entrance to the Alabama State Docks" until November 5, the day the State Court injunction suit was filed by respondent Steamship Association (testimony of Mr. Niera, 132a). On November 3rd, the Port of Mobile had at the Docks the following vessels all of which were foreign-flag: ILKON TAK, AQUA GLORY, BEL HUDSON, and PRESIDENT QUEZON, (96a). Petitioners' so-called "informational pickets" at all entrances to the Docks were directed against all of the vessels in port, as the same are named above (81a, 123a-124a). The ILA refused to cross petitioners' picket lines (117a), shutting down the whole port.

On November 5th, when the State Court injunction suit was filed, the situs of this picketing was shifted to the berths of two of such foreign-flag vessels, the ILKON TAK and the AQUA GLORY, although the petitioners had instructions to picket *all* foreign vessels in the Port. (Testimony of Mr. Niera, 123a-126a). Mr. Niera testified that 70-80% of the vessels that call at the Port of Mobile are foreign flag (126a). These "informational" pickets directed to the "public" of petitioners' plight were placed at the sides of the ILKON TAK and the AQUA GLORY berths at an almost deserted State Docks, far away from the public eye. The AQUA GLORY had called at the Port of Mobile 3 times in the 6 months prior to the ILA strike, and none of the petitioners had attempted to picket her, and witness Macpherson further testified that in the past 13 years he had been in the steamship business in Mobile, none of petitioners had ever posted any informational pickets until the then present time (71a).

Longshoremen and other of respondent Steamship Association's employees represented by locals of the ILA refused to cross petitioners' picket lines or to perform work or services incident to the loading and/or discharge of vessels in the Port (61-75a). Thus, the picketing prevented the Steamship Association and its members from performing its contract to load and unload the foreign-flag vessels picketed, and brought to a halt all business operations having to do with the loading and unloading of vessels.

It is uncontroverted that until enjoined by the Alabama Trial Court, petitioners' pickets had shut down the Port of Mobile.

The Intent, Purpose of the Picketing:

Although the unions claim that their picketing was purely for the purpose of informing the American public of the plight of American seamen who had lost job opportunities to foreign seamen crewing foreign flag vessels, the following testimony of petitioners' only live witness, Mr. Niera, revealed the true purpose, intent and calculated result of such pickets:

(125a - 126a)

"Q. Now Mr. Niera, are you familiar with the type flag vessels that call at the Port of Mobile?

A. Oh yes.

Q. What percentage of the vessels that call here at the Port are of foreign flags?

A. I would say about 70 to 80 percent.

Q. Yes sir. And it is your instructions from your international headquarters to picket 70 or 80 percent of the vessels that call at the Port of Mobile?

A. Within my resources, yes, to picket every one.

Q. And you would assume, as a man knowledgeable in the field of labor picketing that good labor men and good union men would not cross those picket lines?

A. We were hoping that they wouldn't do that.

Q. Yes sir. And this hope has been fulfilled in the Port of Mobile as far as longshore-

men are concerned, isn't that true?

A. Well, to a point, yes.

Q. Now, would it not be then a fair conclusion to say that you had hoped and do hope that you will be able to prevent 70 or 80 percent of the vessels in the Port of Mobile from loading or unloading cargo?

A. My hope is to clutter up the Port of Mobile with foreign ships - Liberian, Panamanian ships - to bring sufficient pressure on the United States Government to do something about the American Merchant Marine.

Q. That is your intention?

A. Yes sir.

Q. That is your purpose?

A. Yes sir."

(130a)

"Q. ...You realize that your picketing is preventing members of the Association from loading and unloading these vessels that you are picketing?

A. I hope that my picket line will shut the whole State Docks down and let everybody go home for a while. I hope I can do that. Not just the Mobile Steamship Association."

(143-144a)

"Q. Alright sir. Now, when you told these pickets to carry this sign that said 'don't patronize this vessel' -

A. Oh yes very polite.

Q. What did you mean by patronize?

A. The only sense that I can understand 'patronize', don't do nothing for it.

Q. Don't do any business?

A. That's right.

Q. Well you hope the longshoremen read the picket signs, don't you?

A. I hope everybody does.

Q. Yes sir. Including longshoremen?

A. Including longshoremen. Including Mobile Steamship Association."

(140a)

"Q. Mr. Niera, you are trying to prevent the AQUA GLORY's last remaining cargo from being discharged and her being used to carry a cargo of grain (soybeans), aren't you?

A. Yes."

(138a)

"Q. At the tipple? You didn't want to get dirty?

A. Right. We don't want our pickets to get dirty, so we put them about a hundred feet from the vessel.

Q. But the crew from the AQUA GLORY that you all didn't want to get dirty would pass by your signs?

A. Oh, yeah, coming and going.

Q. Right. And you wanted them to see your signs, didn't you?

A. Well, that's what we were there for.
Q. Right. And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?
A. That would be nice."

(139a)

"Q. All right, sir. But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seamen, that's what you want, isn't it, Mr. Neira?
A. Yes sir."

Results of Picketing:

As a result of the work stoppages induced by the picketing in question, ireparable injuries were being sustained by the respondent Steamship Association, its members and the Port of Mobile. Member companies of the Steamship Association were losing in excess of $15,000.00 per day in fixed overhead costs. Vessel demurrage costs were ranging from $2,000.00 to $5,000.00 per day, per vessel. Ocean freight revenues were being lost at the rate of $35,000.00 per vessel, per day. The loss to the economy of the City of Mobile resulting from the work stoppage was estimated to be in excess of $3,300,000.00 per week. Other forms of transportation, such as rail, barge, and truck lines which would have normally moved cargo in or out of the Port area

were idled with resulting losses. Inland manufacturing plants were suffering the necessity of curtailing production and laying off personnel, all as a result of the inability of these plants to export their products and/or import raw materials used in the manufacturing process (73a-75a). One Liberian Flag vessel loaded with steel was anchored outside of the Port of Mobile, but would not come in, due to petitioners' shutting the Port down (84-85a).

In addition to the dock workers directly involved in the work stoppages at the Port, a large number of other employees directly connected with the industry were furloughed or laid off as a result of the strike. The Docks facilities of the State of Alabama which consisted of all of the wharves in the Port of Mobile with a cost value in excess of $50,000,000.00, were idle with resulting losses of revenues. Cargo normally shipped through the Port and vessels which normally call at the Port of Mobile had been diverted to other Ports. Foreign shippers were substituting other world markets for their sales and purchases because of the strike, and past experience indicated that a large percentage of that diverted would not revert to the Port of Mobile (74a-75a).

The result of the picketing by petitioners, if it had been allowed to continue, would have been disastrous. Millions of dollars worth of soybeans (approximately 13 million bushels having an estimated value of 50 million dollars) well past the time they should have been harvested, would have been lost, with resulting loss to the community and to the farmers had the Petition-

ers been allowed to continue their announced purpose of picketing all foreign vessels in the Port. Although the unions eventually shifted the pickets to foreign-flag vessels which were not located at the grain elevator, it was the stated purpose of the picketing to close up the entire Port of Mobile and to stop all foreign-flag vessels from operating at that Port (126a-129a), *and at a time when the only vessels in Port were those of foreign-flag.* Moreover, one of the vessels being picketed (the SS AQUA GLORY) and, thus, being prevented from unloading, was scheduled to load soybeans after her ore cargo was discharged.

Not only were the soybean cargoes in jeopardy, the reputation of the Port and the economic interests of the community and members of the Steamship Association were threatened.

The magnitude of the crisis facing the Port of Mobile, and, indeed, the State of Alabama at the time the preliminary injunction was sought and granted is apparent from the record.

The Litigation:

The above are the facts that were heard by the Trial Judge in the State Court on the original complaint of respondent Steamship Association, filed on November 5, 1971, the intervening complaint of respondent Malone, the answer to the original complaint, and the affidavits and testimony of witnesses in open Court. (The State Court had refused respondents' request for an *ex parte* injunction, and set the matter down for trial on November 10, 1971).

With respect to the State Court injunction order not complained of by petitioners until approximately 1 year after it was issued, if petitioners considered that such order was vague in not being sufficiently precise to advise them of what they did wrong, the record is void of any effort to: request more definitive findings; request that the case be set down for trial on the merits; or any motion to dissolve or modify the temporary injunction. If petitioners considered that they were wrongfully enjoined and were suffering immediate and irreparable damage, it is incomprehensible why they did not immediately use the available prompt review procedure (to the Alabama Supreme Court). Instead of seeking prompt redress for any claimed wrongs, the transcript of the State Court proceeding is replete with requests for delays in taking an appeal to the State Supreme Court (6 requests totalling about 1 year to extend time to file a transcript which could not have taken over 2 days to prepare (IIa)). Ultimately, after argument and taking the case under submission, on May 3, 1973, the Alabama Supreme Court affirmed the issuance of the temporary injunction (5a-26a).

Petitioners attempted to have enjoined the State Court's injunctive order in the U.S. District Court for the Southern District of Alabama, and the 5th Circuit Court of Appeals held that the Federal Trial Judge did not abuse his discretion in refusing petitioners' requested relief, *American Radio Association, et als v. Mobile Steamship Association,* 483 F.2d 1 (1973).

ARGUMENT

I.

The Alabama State Court Had Jurisdiction To Enjoin Petitioners' Picketing Of Foreign-Flag Vessels In Mobile And Was Not Preempted From Doing So By The NLRA

In October of 1971, shortly prior to petitioners' setting up pickets in Mobile, using the same methods, picket signs and literature as were used in the case at bar, petitioners picketed 2 foreign-flag vessels in the Port of Houston. The Texas Trial Court declined to enjoin such picketing, on the grounds that it was preempted of jurisdiction by the NLRA. The Texas Court of Appeals affirmed. Upon review, this Court, in *Windward Shipping, etc., et al. v. American Radio Association, etc., et al.*, 94 S. Ct. 959, 39 L. Ed 2d 195, reversed the Texas appellate decision, holding that, absent a clear congressional interest that the NLRB should inject itself into and interfere with the maritime operations of foreign vessels, the rationale of *Benz*,[1] rather than *Ariadne*[2] controlled.

Petitioners argue that, somehow, because respondents' complaint contained allegations of how petitioners' picketing were affecting them, respondents are relegated to the NLRB as their only forum. This argument is totally without foundation. It ignores the plain

[1] *Benz v. Compania Naviera Hildago*, 353 U.S. 138.
[2] *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195.

fact that such allegations complained of the picketing activity (directed at foreign-flag vessels) (36a-37a), setting forth in detail what the signs and leaflets said (36a). The results averred in the complaints (37a-38a, 46a-48a) are identical to those complained of in all the cases from *Benz* to *Windward* — the longshoremen refused to touch the vessels being picketed. Petitioners' argument ignores also the proof and the purposes of the picketing, coming out of the mouth of its own witness, Mr. Neira:

(138a)

"Q. At the tipple? You didn't want to get dirty?
A. Right. We don't want out pickets to get dirty, so we put them down about a hundred feet from the vessel.
Q. But the crew from the AQUA GLORY that you all didn't want to get dirty would pass by your signs?
A. Oh yeah, coming and going.
Q. Right. And you wanted them to see you signs, didn't you?
A. Well, that's what we were there for.
Q. Right. And you want these crews on these foreign flag vessels to react against these foreign flag owners and make those owners raise those wages of those crews, don't you?
A. That would be nice."

(139a)

"Q. All right sir. But if these men benefit from this on these foreign vessels and go to their owner and make their owner raise their wages to the point where those owners have to pay equivalent wages to the American seaman, that's what you want, isn't it, Mr. Neira?

A. Yes sir."[3]

This Court has always been concerned with determining what the unions were doing, and not the identity of the complaining party, *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24, 27-28; *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10.

Petitioners cite *Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (7 Cir.) and *Grain Elevator Workers Local 418 v. NLRB* (D.C.Cir.) 376 F.2d 774 as support for the contention that the NLRB is respondents' sole forum. Again, these cases do not support such contention, even if this Court's decisions in *Benz*, *McCulloch* and *Windward* were totally ignored. In both *Madden* (at p. 1019) and *NLRB* (at p.776), the Courts of Appeals were careful to note that the injunctions secured by the NLRB did not: regulate the internal affairs of the Canadian-owned vessel, or create any conflict or disharmony between Canada and the U.S.; but, instead, involved only action by an American

[3]*Cf.* with *Windward* decision at p. 202: ". . . At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers. . . ."

union against an American employer, and only employees working in a domestic plant of such American employer. In the case at bar, petitioners' efforts were directed at the owners of the foreign-flag vessels, and designed to stir up the alien crews of such vessels against such owners by demanding higher wages and more benefits.

Petitioners have cited no authority to the effect that parties such as respondent Malone, and the hundreds of farmers like him in adjoining States (to Alabama) who depended upon the Docks elevator for storage of their grain sold for export, or respondent Steamship Association members who act as steamship agents and stevedores handling foreign-flag vessels are not among *Windward's* "... citizenry of a country as dependent on goods carried in foreign bottoms as is ours... (p.202). In fact, the reverse is true, *Fruit Dispatch Co. v. NMU*, La. App., 138 So.2d 853 (1962), where plaintiff was consignee of cargo of perishable bananas.

Lastly, petitioners say *Windward* might not apply to the preemption issue to the case at bar if any of the foreign-flag vessels were owned by Americans. Firstly, what percent, if any, of stock of a vessel-owning corporation may be held by an American depends entirely upon the laws of the foreign-flag country; secondly, there is not the slightest hint in the record that any of the picketed foreign-flag vessels were owned, in whole or in part, directly or indirectly by an American citizen; and, thirdly, it would not make one particle of difference on the preemption issue if the

stock of the owning corporation of every vessel were owned by an American, *McCulloch, supra.*

Contrary to petitioners' contention that the Alabama Courts had gone "off the (constitutional) loom" (brief, p.23), the Alabama Courts were correct in deciding that jurisdiction was not preempted by NLRB, following *Benz*, now buttressed by *Windward.*

The method, purpose and result of such picketing fall squarely within the facts of *Windward* and *Benz*, which are clear authority that the NLRA does not, under the facts of the case at bar, preclude a State Court from asserting jurisdiction in a lawsuit to enjoin such picketing.

II.

Petitioners' Picketing Is Not Constitutionally Protected And Was Properly Enjoined

At the outset, it is to be noted that petitioners make frequent complaint that the State Trial Judge made no specific findings of fact, and the State Supreme Court engaged in rationalization and inference in affirming the lower Court. The trial judge was not, under Alabama law, compelled to enter specific findings of fact, *Loftin v. Parker*, 253 Ala. 98, 42 So.2d 824. However, petitioners never requested that the Court amplify its decree, nor was there ever filed any motion to stay, modify or dissolve the temporary injunction. When comment was solicited from counsel for petitioner by the trial judge, after announcing his decision, there was no objection, no request for any more definitive findings (145a). In *International Brotherhood v. Vogt*, 354 U.S. 284 (pp.284-285), the trial Court refused to make the specific findings requested by counsel for the union. On appeal, the Wisconsin Supreme Court first reversed, then withdrew its opinion, and then affirmed, but on a totally different ground from that relied on by the trial Court. Such affirmance was based upon the Wisconsin Supreme Court's reviewing the evidence and drawing the inference that the picketing was for an unlawful purpose. *Vogt* (p.287-288) also refers to the *Stacy* case, where the Maine Supreme Court also drew its inference from the testimony. This Court reviewed the opinions of the Wisconsin and Maine Supreme Courts both based on inference, and the respective records and found no error in either. In the case at bar, the Alabama Supreme Court reviewed carefully the record and decree of the trial Court, and affirmed same. Being well aware of the evidence presented and the trial Court's decree entered, and making no effort to secure any more definitive findings, it is obvious that petitioners considered it more advantageous to their position to proceed on the record as it is now presented.

Picketing by an Organized Group is Free Speech, Plus, and is the Subject of Restrictive Regulation:

Petitioners assert that the pickets were doing no more than just asking the public to "Buy" or "Ship American" (brief p.21). If this were true, this party would never have been enjoined. Despite the fact that the evidence clearly demonstrated that the intent or purposes of the picketing were: to shut down the

Docks; force the foreign shipowner to pay its crew the equivalent of American seamen's wages; and nullify the rights of respondents to fulfill their contracts and make a living, petitioners come into this Court with the assumed posture that because of the First and Fourteenth Amendments, they "are given special constitutional protection denied all other people."[4] Neither the facts nor the law of this case supports any such position.

There is no question in this case but that the effect of the pickets was to shut down the Docks. Picketing is free speech, plus, the "plus" being physical activity that may implicate traffic and other matters, and the "plus" factor may be regulated.[5] The Constitution does not demand that the element of communication in picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.[6] Picketing, although having an ingredient of communication, cannot dogmatically be equated with the constitutionality of protected free speech.[7]

The States Have the Right to Impose Reasonable Restraints Upon Picketing Activities as the Same May Affect the Rights of its Citizens and the Use of State Property:

Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose

---

[4]*Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 496.
[5]*Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 326.
[6]*Hughes v. Superior Court of California*, 399 U.S. 460, 464-465.
[7]*Bakery & P. Drivers & Helpers v. Wohl*, 315 U.S. 769, 776-777.

which it seeks to effectuate gives ground for its disallowance, *Hughes, supra*, pp. 465-466. A State is not required to tolerate in all places even peaceful picketing by an individual, *Wohl, supra.*, p.775. It is within the province of States to set the limits of permissible contest open to industrial combatants, and, indeed, it is the "power and the duty" of a State to "preserve the peace and to protect the privacy the lives and the property of its residents", *Thornhill v. Alabama*, 310 U.S. 88, 104-105. It makes no difference whether the State policy in this respect is expressed in its Constitution, its Legislature or its Courts, or whether the same is reflected in its civil or its criminal law, *Vogt, supra*, p.293. The States also have the right to impose regulation upon picketing where use of its property is concerned, *Logan Valley Plaza, supra*, pp.320-321; *Cameron v. Johnson*, 390 U.S. 611; *Cox v. Louisiana*, 379 U.S. 559; *Cox v. New Hampshire*, 312 U.S. 569; and *Adderly v. Florida*, 385 U.S. 39.

The Picketing Violated Respondents' Rights Under Alabama's Valid Law Against Unlawful Interference with Their Right to Engage in a Lawful Occupation, and Their Rights Under the Alabama Constitution, the Federal Constitution and the Federal Law:

Respondent Malone was not involved in any labor dispute, conflict or disagreement with any of the petitioners, respondent Steamship Association, or anyone else (134a-135a). Soybeans are perishable, and must be harvested when ready, or the beans will fall on the ground where they cannot be combined and picked up (78a). He, like so many other soybean farmers in

South Alabama, had no on-farm storage for beans, and had borrowed money against the crop, secured by a mortgage on his farm equipment (77a-80a). The only storage facility for farmers such as Malone growing crops in South Alabama, Northwest Florida and Southeast Mississippi who, like Malone, had agreed to sell their beans for export, was the Docks' elevator (44a). This elevator's limited capacity to handle a large crop of beans was such that there had to be a continuous flow of beans through the elevator and into the cargo holds of vessels, or the elevator becomes full and cannot receive any more beans (74a, 78a, 80a, 86a-87a). In fact, the delay in loading the BEL HUDSON with grain for over 1 month caused by the ILA and by petitioners' pickets had already put Malone in default on his farm equipment, note and mortgage (79a, 133a). On the evening before the trial, Mr. Malone had been in line for hours behind 70 other trucks waiting his turn to unload at the elevator. He summed up his plight, as follows (80a):

> "In other words, if the Alabama State Docks elevator can't store my beans, I can't sell the beans, they just stay in the field and rot."

Members of respondent Steamship Association had contracts with the owners of the picketed foreign-flag vessels to load and discharge same.

The "intent" and "purpose" of the pickets was stated unqualifiedly by Mr. Neira to "clutter up the Port of Mobile with foreign-flag vessels ... to bring sufficient pressure on the United States Government to do

something about the American Merchant Marine" (125a-126a). He also testified that a purpose was to keep the AQUA GLORY from being able to load a cargo of soybeans (140a); and to make the foreign shipowners raise the foreign crewmen's wages to equal those paid U.S. mariners (139a). The examination of Mr. Neira was prefaced with the understanding that "your" meant all of the picketing petitioners (115a).

This harmful effect of his testimony to petitioners' cause is apparent by efforts reflected in petitioners' brief (p.25) to equate such testimony to the "vagrant" mutterings and personal observations of a "low level official". Mr. Neira was the Port Agent for the petitioner SIU for 12 years (106a). It was Mr. Neira who called the committee (of petitioners) and told them what the unions were going to do (108a-109a). It was also Mr. Neira who put out the pickets and instructed them in cooperation with other members of the committee (143a).

The impact of the pickets fulfilled the purpose and intent of same — the Port was shut down, since the ILA longshoremen would not cross the picket line.

The purpose and intent was not just a "hope", and the cases cited by petitioners on pages 26-27 on their brief do not apply.

Assuming, *arguendo*, that there is somehow some ambiguity about Mr. Neira's testimony as to intent and purpose of the pickets, in the absence of admissions by the union of an illegal intent, the nature of

acts performed shows the intent, *Local 761 v. NLRB*, 366 U.S. 667, 674. Such actions were: to picket every foreign-flag vessel in the Port (effectively shutting the Port down); the "Public" on the picket signs at an isolated, almost empty Docks could mean only the foreign crewmen aboard the picketed vessels and the ILA longshoremen who refused to cross the picket line; and, instead of seeking publicity through the news media and by word of mouth, pickets were instructed not to talk to anyone, including such media (114a). The timing was such that the pickets went up moments after a Mobile Federal Judge indicated his intent to sign a back-to-work order directed to a sister (to petitioners) union, the ILA.

What is the policy and law of Alabama to protect State property and the rights of its citizens? Section 13 of Article 1 of its Constitution charges Alabama with the duty of keeping its Courts open for the purpose of providing a remedy by due process of law for any injury to one's person, lands or goods, *Russell v. International Union, etc.*, 258 Ala. 615, 64 So. 2d 384. Section 6 of Article 1 of its Constitution guarantees a citizen that he shall not be deprived of his life, liberty or property without due process of law.

It is clear that while peaceful picketing, standing alone, is lawful and not to be enjoined, picketing still may be enjoined if it is done in an unlawful manner or for an unlawful purpose. *Local No. 612, International Brotherhood of Teamsters v. Bowman Transportation, Inc.*, 276 Ala. 563, 165 So.2d 113; *Baggett Transportation Co. v. Local 261, etc.*, 259 Ala. 19, 65 So.2d 506.

It is also clear, under Alabama law, that unlawful interference with one's right to conduct his business is a tort, and will be protected, if necessary, by injunction, *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383 where the Supreme Court stated at page 384:

> "Our decisions are to the effect that the right to conduct one's business without the wrongful interference of others is a valuable property right which will be protected, if necessary, by injunctive process. Bowen v. Morris, 219 Ala. 689, 123 So. 222. And the enjoyment of the good name and good will of a business is likewise a valuable property right subject to like protection. Bankers' Fire & Marine Ins. Co. v. Sloss, 229 Ala. 26, 155 So. 371. One's employment, trade or calling is likewise a property right, and the wrongful interference therewith is an actionable wrong. United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732, 29 A.L.R.520."

Also expressing Alabama's clear policy in this respect is *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332, where the Court said at page 334:

> "In necessary consequence, an unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies. Holt, C.J., in *Keeble v. Hickeringill*, 11 East, 574, thus states the doctrine: 'He that hinders another

> in his trade or livelihood is liable to an action for so hindering him' — though it must be that he intended the broad declaration to be subject to the qualification that the hindrance, the act or conduct so resulting, be wrongful, unlawful, and this, independent, as a general rule, of the motive or intent with which the hindrance was accomplished."

Alabama's policy against wrongful interference with the business of another is best illustrated by *Pennington v. Birmingham Baseball Club, Inc.*, 277 Ala. 336, 170 So.2d 410. Here, the operator of the Birmingham Barons sought to restrain picketing at the baseball field the Barons had leased. The picketing was being conducted by unions representing carpenters and workmen, and it occurred after non-union carpenters and workmen performed repairs on the stadium. Pickets were placed at or near the entrances to the baseball stadium on the occasion of each baseball game carrying signs stating: "This park remodeled by non-union labor." The effect of the picketing was to reduce attendance at the home games of the Barons.

The Alabama Circuit Court enjoined the unions' picketing, and the Supreme Court affirmed on the basis that the picketing was a wrongful interference with the business of the Birmingham Barons, stating at page 416:

> "It is out opinion that the averments of the bill show a wrongful interference with complainant's business.... The general objectives of

> picketing are well known. Clearly the purpose and effect of the picket line whereon signs were displayed by saying, 'this park remodeled by nonunion labor,' was to affect attendance at baseball games sponsored by complainant, with whom the respondents had no controversy, past or present. ... The picketing carried on by respondents was entirely punitive, since there was no controversy between respondents and the complainant concerning any facet of employer-employee relationship."

Alabama's policy prohibiting wrongful interference with the businesses of others has been recognized in other states. For example, Louisiana has upheld an injunction of picketing by a labor union in a situation strikingly akin to the one now presented. *Fruit Dispatch Co. v. National Maritime Union*, 138 So.2d 853 (La. App. 1962). In that case, the Louisiana Court of Appeals found the picketing of foreign-flag vessels to be beyond the jurisdiction of the NLRB and tortious under Louisiana law:

> "That the picketing is peaceful does not warrant its pursuit when it is illegal and tortious; illegal because its purpose is to interfere with and regulate the internal affairs and management of foreign vessels in violation of treaty rights and guarantees, and *tortious* because its immediate effect is to cause irreparable property and financial loss to the foreign ship owners and their foreign and *American business associates. Bakery & Pastry Drivers &*

> *Helpers Local 802 v. Wohl*, 315 U.S. 769, 776-777, 62 S. Ct. 816, 86 L. Ed. 1178, cited with approval in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834, 138 So. 2d at 856 (Emphasis added.).

Certainly, in addition to protecting its own citizens' rights, the State of Alabama had a valid interest in its policy, as owner and operator of the Docks system to keep the same open and available "for the convenient use of the same in the aid of commerce," as provided in Section 1(19), Title 38, Code of Alabama. This right should be no less than that accorded Florida with respect to jail ground property, *Adderly v. Florida, supra,* or Louisiana, with respect to courthouse grounds, *Cox v. Louisiana, supra.*

Federal decisions also recognize that a person's business or occupation is a property right not to be unlawfully interfered with, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Traux v. Corrigan*, 257 U.S. 312, 327. Certainly, as to Malone's soybean crop, and other farmers in like predicament, there was the "clear and present danger of destruction of property" referred to in *Thornhill, supra,* at page 105. The U.S. Fifth Amendment also guarantees that no one's property shall be taken without due process of law.

It is perfectly obvious that petitioners violated these respondents' rights under Alabama and U.S. law to make a living when they effectively shut down the Port of Mobile, a purpose and result unlawful in and of itself. Their tortious behavior is compounded by petitioners' starting on their cause of conduct and movements after it became known that a sister union was

going to be put back to work by a Federal Judge. This was not *Logan Valley,* protected picketing as claimed by petitioners. In *Logan Valley,* only 1 store in a public shopping center was picketed, as distinguished from picketing and effectively closing down the entire shopping center; and this Court found neither purpose nor manner to interfere with the public use of such shopping center. In fact, petitioners' pickets were unlawful in violating *Logan Valley's* admonition (p.613) that the picketing be conducted in such a manner as to not "unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it" — these respondents were shut off from any use whatsoever of public Docks' property.

The Alabama Court undoubtedly "balanced the competing interests" (the right of the element of communication in picketing against the power of the State to set the limits of conduct open to industrial combatants) *Vogt, supra, Teamsters Local 309 v. Hanke,* 339 U.S. 470; and *Carpenter's & Joiners Union of America v. Ritter's Cafe,* 315 U.S. 722, where this Court stated at pages 724-725:

> "The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. 'Courts were required, in the absence of legislation, to determine what the public welfare demanded; — whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to

> invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable.' "

Under the facts and the law, the Alabama Court found petitioners to have violated its valid policy. While certainly this Court will review the trial transcript, the orders and opinions of the State Court, we submit that the trial Court was correct in enjoining petitioners. We further submit that the Supreme Court of Alabama was correct in affirming the lower Court, and that its opinion should come to this Court for review "bearing a weighty title of respect" that it is due, *Hanke, supra*, p.475.

CONCLUSION

THE ALABAMA COURTS HAD JURISDICTION TO DETERMINE THAT PETITIONERS VIOLATED ITS VALID STATE POLICY, AND ITS OPINIONS SHOULD, IN ALL RESPECTS, BE AFFIRMED. PETITIONERS' PROPER FORUM IS THE U.S. CONGRESS.

Respectfully submitted,

_____

Alex F. Lankford, III
Counsel for Respondent
Robert E. Malone

OF COUNSEL:
HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
3000 First National Bank Building
Mobile, Alabama 36603

CERTIFICATE OF COUNSEL

I, Alex F. Lankford, III, attorney for respondent Robert E. Malone, do hereby certify that on this the ____ day of August, 1974, three copies of the foregoing brief on Writ of Certiorari have been served on each of the following attorneys of record:

Howard Schulman, Esq.
Schulman, Abarbanel and Schlesinger
1250 Broadway
New York, New York 10001
and
Otto E. Simon, Esq.
Simon and Wood
1010 Van Antwerp Building
Mobile, Alabama 36602
Attorneys for Petitioners

Frank McRight, Esq.
Armbrecht, Jackson & Demouy
1101 Merchants National Bank Bldg.
Mobile, Alabama 36602
Attorneys for Respondent
Mobile Steamship Association

by mailing the same to them through the United States Postal Service, postage prepaid.

_____

Alex F. Lankford, III

INDEX

Page

ARGUMENT 1

CONCLUSION 19

CITATIONS

CASES:

Carpenters Union v. *Ritter's Cafe*, 315 U.S. 769 13

Electrical Workers (General Electric) v. *NLRB*, 366 U.S. 667 5

Food Employees v. *Logan Valley Plaza*, 391 U.S. 308.. 14

Grain Elevator, Flour & Feed Mill W., ILA Local 418 v. *NLRB*, 376 F.2d 774 (C.A.D.C.), cert. denied 389 U.S. 932 6

IBEW, *et al*, 150 NLRB 363, enforced 350 F.2d 791 (C.A.D.C.) 9

IBEW v. *NLRB*, 341 U.S. 694 13

Longshoremen v. *Adriane Co.*, 397 U.S. 195 3

Madden v. *Grain Elevator Flour & Feed Mill Wkrs., etc.* 334 F.2d 1014 (C.A.7), cert. denied 379 U.S. 967 ..... 6, 8

Motor Coach Employees v. *Lockridge*, 403 U.S. 274 9

NLRB v. *Operating Engineers*, 400 U.S. 297 ..... 5, 13

Organization for a Better Austin v. *Keefe*, 402 U.S. 415 17

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 ..... 9, 11, 12

Steelworkers (Carrier Corp.) v. *NLRB*, 376 U.S. 492.. 5

Teamsters Union v. *Morton*, 377 U.S. 252 10

Thornhill v. *Alabama*, 310 U.S. 88 ..... 13, 14, 16

Page

William E. Arnold Co. v. *Carpenters District Council*, —— U.S. ——, 42 U.S.L.Wk. 4754 9

Windward Shipping (London) Ltd. v. *American Radio Ass'n.*, —— U.S. ——, 42 U.S.L.Wk. 4234 ..... 4, 6, 12

STATUTES:

National Labor Relations Act as amended by the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*:

§ 2(1) 3

§ 2(3) 3

§ 2(5) 3, 6

§ 2(6) 3

§ 8 9

§ 8(b)(4) 4, 5, 6, 8, 9, 10, 11, 13

§ 303 9

MISCELLANEOUS:

Legislative History of the Labor Management Relations Act of 1947 ..... 10, 11

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC. AND ROBERT E. MALONE,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amcius,* in support of the respondent unions, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

At pp. 12 to 19 of this brief we develop the argument

that the injunction[1] issued by the Alabama courts can not pass muster under the First Amendment. But we address that constitutional issue only out of an abundance of caution. For, there is a threshold statutory issue presented which requires that the decision below be reversed. As we first show, the National Labor Relations Board, alone, has jurisdiction to secure an injunction against peaceful non-

[1] The operative portions of that injunction prohibit:

"1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant Mobile Steamship Association, Inc.

"2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for members of Complainant Mobile Steamship Association, Inc.

"3. Interfering with the operations of any member of Complainant Mobile Steamship Association, Inc. in any manner whatsoever.

"4. Picketing or interfering at or near Complainant Mobile Steamship Association, Inc. and its members' premises or premises used by Complainant Mobile Steamship Association's members in a manner calculated to intimidate Complainant Mobile Steamship Association's members' employees or anyone working in association with the Complainant Mobile Steamship Association's members, or any other person entering or leaving or attempting to enter or leave Mobile Steamship Association's members' premises, or calculated to induce any such persons not to report or apply for work at Mobile Steamship Association's members' premises, or any facility used by Mobile Steamship Association's members.

"5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

"6. Interfering with the contractual relations existing or to exist between the members of the Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile." (App. pp. 29a-30a.)

obstructive, non-trespassory, picketing and handbilling by a "labor organization" on the ground that the union's purpose is to induce "employees" of "persons" engaged in "commerce" (as those terms are defined in §§ 2(1), (3), (5) & (6) of the National Labor Relations Act) to engage in a secondary boycott.

1 (a). This case grows out of "a labor dispute between [a group of] American unions [representing seamen on American flag vessels] and the operators of the [SS] Aqua Glory [a foreign flag ship]." (App. p. 9a.) To publicize that dispute four members of those Unions picketed and handbilled the Aqua Glory at dockside in Mobile. (App. p. 8a.) While the Unions did not have a primary dispute with the American stevedoring companies that load foreign flag (as well as American) ships the picketing and handbilling did result in a refusal to load the Aqua Glory by American "stevedore workers" employed by the member companies of the Mobile Steamship Association, a "person engaged in commerce," (see *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195). (App. pp. 18a-19a.)

The Supreme Court of Alabama did not purport to define the comparative rights of the parties to the primary dispute (the foreign flag ship, which is not even a party to this cause, and the Unions). And the injunction that was issued (p. 2 n. 1, *supra*) runs in favor of the Association and not the Aqua Glory, and regulates the Association's employer-employee relationships, and not the employer-employee relationship between that foreign flag ship and its crew. Nevertheless the Alabama Supreme Court, while recognizing that "where there is a clearly defined labor dispute affecting commerce the NLRB has jurisdiction preemptive of all courts state and federal," held that:

> "where the dispute is one where commerce, as covered by the federal act, is not involved, and the resulting effect, albeit non-direct, of the dispute immediately endangers the business activities of a large segment of the area's population, we think that it is neither illegal nor improper for the court to take jurisdiction and deal temporarily with the subject matter." (App. p. 16a)

Thus, that court attempted to assimilate the instant case to the line of authority culminating in *Windward Shipping (London) Ltd.* v. *American Radio Ass'n.*, U.S. , 42 U.S.L.Wk. 4234 (Feb. 19, 1974), holding that disputes between American unions and foreign flag ships are not in "commerce" for purposes of the NLRA. That was clear error. For here the controversy before the courts is not the one between the Aqua Glory and the Unions, but one between the Unions, the Association and the Association's employees. All of the parties to that dispute are American and all are in "commerce." Thus, this is a case in which "there is a clearly defined labor dispute affecting commerce [over which] the NLRB has jurisdiction preemptive of all courts state and federal." (Cf. App. p. 16a.[2]) Indeed, this case is indistinguishable from secondary boycott cases over which the Board has exercised jurisdiction.

(b) Section 8(b)(4) of the NLRA provides in pertinent part:

[2] We do not intend to even imply that the Alabama courts would not have the authority to treat with a complaint predicated on the theory that the Unions do not have a right under Alabama law to pursue their primary dispute with a foreign flag ship by picketing and handbilling that ship. We recognize that under *Windward Shipping* the state courts do have jurisdiction to adjudicate the comparative rights implicated by such a complaint. But here the complaining parties are American "persons engaged in commerce," and their complaint raises issues covered by the NLRA.

> "It shall be an unfair labor practice for a labor organization or its agents * * * to induce or encourage any individual employed by any person engaged in commerce * * * to engage in, a strike or a refusal in the course of his employment to * * * transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services * * * where in either case an object thereof is * * * forcing or requiring any person to cease * * * handling, transporting, or otherwise dealing in the products of any other producer, * * * or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

And in *NLRB* v. *Operating Engineers*, 400 U.S. 297, 302-303, this Court explained:

> "Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8(b)(4)(B). This concern was focused on 'secondary boycotts,' which was conceived of as pressure brought to bear, not 'upon the employer who alone is a party [to a dispute], but upon some third party who has no concern in it' with the objective of forcing the third party to bring pressure on the employer to agree to the nion's demands." (footnotes omitted.)[3]

Thus, the issue posed in this proceeding—whether the picketing of one person by a "labor organization" which resulted in a work stoppage by "employees" of a third

[3] Mr. Justice Marshall was also careful to note that not all picketing that "seriously affect[s] neutral third parties" is a violation of § 8(b)(4). (*Id.* citing *Steelworkers (Carrier Corp.)* v. *NLRB*, 376 U.S. 492, 502; *Electrical Workers (General Electric)* v. *NLRB*, 366 U.S. 667, 673.)

"person engaged in commerce" should on that account be enjoined—is grist for the Board's mill. Indeed, the only factor that distinguishes this case from any of a hundred NLRB cases under § 8(b)(4) is that the Unions' primary dispute is with a foreign flag ship, and, under *Windward Shipping*, that dispute is, therefore, not in "commerce," for the purposes of the NLRA. But, while that factor deprives the Board of authority to determine the rights of the Unions and the ship with regard to their primary dispute which centers on the "maritime operations of [a] foreign vessel" (42 U.S.L.Wk. at 4237), it is an irrelevancy, where as here, resolution of the case turns not on an evaluation of the rights of the Unions and a foreign flag ship but solely on the competing rights of American "labor organizations", "person engaged in commerce" and "employees," all of whom are covered by the NLRA. There is no doubt that § 8(b)(4) has equal application to union conduct which impinges neutral "persons engaged in commerce," whether or not the underlying primary dispute is also covered by the NLRA. That is the plain import of the provision's language which is directed at all the enumerated activities of "labor organizations" (as defined in § 2(5)), and not simply at the secondary ramifications of primary disputes within the Board's reach. And, that, without exception, is the lesson of the cases.

The precedents most closely in point are *Madden* v. *Grain Elevator Flour & Feed Mill Wkrs. etc.*, 334 F.2d 1014 (C.A.7) cert. denied 379 U.S. 967, and *Grain Elevator, Flour & Feed Mill W., ILA Local 418* v. *NLRB*, 376 F.2d 774 (C.A.D.C.), cert. denied 389 U.S. 932, both of which grew out of the same controversy. *Madden* arose on:

> "appeals from the district court brought by the Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO, herein designated as the Local, and Seafarers' International Union of North America, herein designated as SIU, respondents, who were also respondents below as named in several petitions filed by Ross M. Madden, Regional Director of the National Labor Relations Board, for and on behalf of said Board, petitioner, for injunctive and other relief. Jurisdiction is based on Section 10(*l*) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 160(*l*), as amended, alleging violations of the secondary boycott provisions of § 8(b)(4)(i) and (ii) (B) of the Act, by SIU and the Local. Respondents filed an answer which denied that the Board or the district court had jurisdiction and denied various other material allegations of the petition.
>
> "On May 29, 1963, the court issued a temporary restraining order, which in substance enjoined respondents and all members acting in active concert with them from in any manner or by any means including picketing, orders, directions, instructions, requests or appeals inducing or encouraging any employee of Continental Grain Company (herein-after called Continental) to refuse to handle any goods at the port of Chicago, where the object thereof was to force Continental to cease doing business with Upper Lakes Shipping, Ltd., a Canadian corporation (hereinafter called Upper Lakes)." (334 F.2d at 1016).

There the unions argued:

> "that the [District] Court, when entering the temporary injunction on June 14, 1963, made no findings or conclusions sufficient to establish jurisdiction, in view of this statement from Ineres SS. Co. v. International Maritime Workers, 372 U.S. 24, 27:

> '* * * The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances "affecting commerce," and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in "commerce" within the meaning of § 2(6), 29 U.S.C. § 152(6).' " (*Id.* at 1019.)

The Seventh Circuit rejected that argument on the ground that:

> "no attempt is being made to regulate or to apply the Act to the 'internal management or affairs' of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer." (*Id.*)

In the companion *NLRB* case, which arose on a petition to review the Board's ultimate finding that a § 8(b)(4) violation had in fact occurred, the unions renewed the argument which had been rejected by the Seventh Circuit, and Judge Leventhal (speaking for himself, then Judge Burger and Judge Danaher) replied by citing and following *Madden*:

> "Petitioner contends that the Board lacked jurisdiction because the subject matter of the primary dispute involves the internal affairs of parties based in Canada. The short answer is that the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country, 'directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.' " (376 F.2d at 776.)[4]

Thus, there can be no doubt that the Board has the authority to grant relief to American "persons engaged in commerce", such as the Association here, who allege that they are neutrals to a primary dispute (which is not covered by the NLRA), and that the union's method of advancing its interest in that dispute has resulted in a secondary boycott by their American employees.

(c) So far as we are aware, there is no dissent from the proposition that a complaint seeking injunctive relief which in substance charges a union with an arguable violation of § 8 of the NLRA, and which does not rest either on an alleged breach of a collective agreement or on violence by the union, is within the exclusive primary jurisdiction of the NLRB. (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. *Cf.*, *William E. Arnold Co.*, v. *Carpenters District Council*, —— U.S. ——, 42 U.S.L.Wk. 4754, 4755 (May 20, 1974); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284-285 (opinion of the Court), 325-327 (White, J., dissenting).)

That proposition has special force where the complaint requires an inquiry into the right of a "labor organization" to induce the "employees" of neutral "person engaged in commerce" to refuse to perform services for their employer. For in § 8(b)(4) & § 303 Congress:

---

[4] See also *IBEW, et al*, 150 NLRB 363, enforced 350 F.2d 791 (C.A.D.C.), (holding that § 8(b)(4) applies to inducement of a secondary boycott by "labor organizations" growing out of a primary dispute covered by the Railway Labor Act and not the NLRA).

"comprehensively and with great particularity 'describe[d] and condemn[ed] specific union conduct directed to specific objectives.' Carpenters Local 1976 v. Labor Board, 357 US 93, 98,

* * * *

[T]his is [therefore] an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176." *Teamsters Union* v. *Morton*, 377, U.S. 252, 258, 261.

An essential counter in the balance struck by Congress is that those who enjoy the protection of § 8(b)(4) are both limited to the recovery of actual damages (as *Morton* holds (*id.* at 261)), and to securing injunctive relief against secondary conduct through the NLRB.[5]

[5] When the [Taft-Hartley] bill reached the Senate floor, Senator Ball proposed an amendment which would have given "an injured party * * * suffering from a secondary boycott or jurisdictional strike, * * * the right to go directly into a district court and seek injunctive relief." (93 Cong. Rec. 4835; 2 Leg. Hist. of the LMRA of 1947, 1350.) The proponents of this amendment argued that secondary boycotts are so objectionable that the injured person should have "the right to control its own litigation, to hire its own lawyer, to take such steps as it deems proper, and to go into such court as it deems proper to proceed in"; the injured party "should not have to depend * * * upon the judgment of some bureaucrat in whom is lodged the power to determine whether such a course should be followed." (93 Cong. Rec. 4837, 2 Leg. Hist. 1353. See also 93 Cong. Rec. 4835-4836, 4838; 2 Leg. Hist. 1350-1351, 1355.) The opponents contended, on the other hand, that to permit private parties to obtain injunctive relief for alleged unfair labor practices would open the door to the abuses of the labor injunction which led to the enactment of the Norris-LaGuardia Act. (See, e.g., 93 Cong. Rec. 4133, 4839, 4843, 4846; 2 Leg. Hist. 1057, 1356-1357, 1364-1365, 1369.)

Senator Taft, finding "that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seemed to be so strong," proposed that the language of the Senate bill authorizing the Board alone to obtain injunctive relief be retained, and that the private party be given "the right to sue for damages." (93 Cong. Rec. 4843-4844, 2 Leg. Hist. 1365.) The Ball amendment was thereafter defeated (93 Cong. Rec. 4847, 2 Leg. Hist. 1370), and Senator Taft introduced his substitute, which he explained as follows (93 Cong. Rec. 4858, 2 Leg. Hist. 1370-1371):

> "This is similar to the Ball amendment, dealing with jurisdictional strikes and secondary boycotts. It eliminates the injunctive process, the suspension of the Norris-LaGuardia Act, which I found was creating so much difficulty and opposition to the Ball amendment. It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike."

Senator Taft's amendment, the present Section 303 of the Labor Management Relations Act, was adopted. (93 Cong. Rec. 4874, 2 Leg. Hist. 1400.) After the Senate provisions had been approved by the House-Senate Conference Committee, Senator Taft stated:

> "The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions, regarding injunctions are exactly those which were in the Senate bill, and were approved by the Senate. The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes. In such cases the injunction can be obtained only through the National Labor Relations Board. * * *." (93 Cong. Rec. 6445-6556, 2 Leg. Hist. 1544.)

The injunction issued in this case confirms the conclusion that the *Garmon* rule governs here. First, it bears repetition that the sole office of the injunction is to determine the comparative rights of "labor organizations" whose inducement of secondary boycotts § 8(b)(4) is designed to regulate, and "person engaged in commerce" whom that pro-

vision is designed to a certain point to protect. Second, while the ostensible basis for state court jurisdiction is the existence of a primary dispute with a foreign flag ship (which, therefore, is not a dispute in "commerce" for purposes of the NLRA under *Windward Shipping*), the injunction issued is not so limited. It prohibits all picketing "at or near [the Association] premises"; "any interfere[nce] by words or actions [with] any person or persons working for [the Association]"; "interfering with the operations of [the Association] in any manner"; "picketing directed at vessels with whom [the Association has] contractual relations"; and "interfering with the contractual relations existing or to exist between [the Association] and * * * vessels calling at the Port of Mobile." Thus, the injunction, in terms, reaches union action growing out of labor disputes wholly within the NLRA's boundaries, as well as the hybrid situation presented here. This invasion of the heartland of the Board's jurisdiction underlines the Alabama courts' lack of fidelity to the exclusive primary jurisdiction doctrine enumerated by this Court in *Garmon* and its progeny.

2. The First Amendment issue posed but not reached in *Windward Shipping* (see 42 U.S.L.Wk. at 4238 (Brennan, J., dissenting)) is whether the states may ban peaceful primary picketing and handbilling publicizing the substandard labor conditions of a foreign flag ship, and requesting the public not to patronize the vessel. This case, like *Windward* does not provide a proper occasion for final resolution of that question. For, the Alabama Supreme Court's rejection of the Union's first Amendment argument (App. pp. 16a-26a) is susceptible to two readings: one provides further support for the preemption argument just developed; the other demonstrates that the injunction issued rests on the error of law corrected in *Thornhill* v. *Alabama*, 310 U.S. 88.

(a) There are references in the opinion which can be taken as meaning that the Alabama law concerning wrongful interference with another's business permits picketing to publicize a labor dispute even though that may result in an "incidental interference" to a third party's business, but prohibits such picketing if its "purpose or object" is to put direct pressure not only on the primary employer but also on that third party. (App. p. 20a; *id.* at 25a-26a) If that is the limit of the Alabama law, the law itself (as opposed to its possible misapplication) is validated by *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 769 and *IBEW* v. *NLRB*, 341 U.S. 694. Then, however, the Alabama law would, in all essential respects, parallel the federal law embodied in § 8(b)(4) of the NLRA. (Cf., *Operating Engineers*, 400 U.S. at 302-303.) And, as we have already seen in the Act, Congress has not only spoken on the extent to which neutral "persons engaged in commerce" shall be protected from activity by "labor organizations" designed to create a "secondary boycott"; in order to avoid the excesses in particular cases that led to enactment of the Norris-LaGuardia Act, the national legislature has determined that only the NLRB shall have the authority to secure an injunction against such activities.

(b) Insofar as the secondary boycott rationale just noted was not determinative, the Alabama Supreme Court's opinion is an expression of the view that the "valid state interest in the preservation of [its] local economy" and in the " 'avoidance of economic stagnation in the local community' caused by state activity," is a sufficient predicate

to enjoin picketing and handbilling publicizing a labor dispute as a wrongful interference with business relations. (App. p. 19a.) That view, of course, deprives picketing and handbilling by "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies" (cf., *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 324), of all constitutional protection. For, the object of any such publicity is to persuade those who agree, not to do business with the offending businessmen, and in that way to "interfere" with his business and the business of those who would otherwise deal with him.

This expansive view of the states' authority to ban peaceful communicative activity as an interference with business relations is precisely that which formed the predicate for the conviction reversed in *Thornhill*. There the Alabama courts had gone so far as to apply their law:

> "so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." (310 U.S. at 98-99; footnotes omitted.)

This Court noted that:

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon

> either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." (*Id.* at 99)

Because the state had swept with too broad a brush the Court invalidated its restraint on free speech, explaining:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. * * * In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.
>
> * * * *
>
> "The range of activities proscribed by [Alabama], whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the

dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the Alabama statute]." (*Id.* at 101-105.)

The subsequent process of litigating elucidation summarized by Mr. Justice Frankfurter in *Teamsters* v. *Vogt*, 354 U.S. 284, resulted in a "realiz[ation] that the broad pronouncements, *but not the specific holding*, of Thornhill had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated." (*id.* at 289, emphasis added). For, in contrast to *Thornhill* the intervening cases were ones:

"In which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation." (*Id.*)

But, since the "specific holding of *Thornhill*" retains its vitality, the Chief Justice has recently remanded that a state may not issue a temporary injunction against an

organization found to "protest various real estate tactics and activities generally known as 'blockbusting' or 'panic peddling,' prohibiting it "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois," in pursuit of its objective of persuading a real estate broker "to sign an agreement whereby they would not solicit property, by phone, flyer, or visit, in the Austin community." (*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 416-417.)

"This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. *E. g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See Schneider v. State, *supra;* Thornhill v. Alabama, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. Carroll v. Princess Ann, 393 U.S. 175, 181

(1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." (*Id.* at 419)

And, there are "no prior decisions" supporting the position of the Alabama Supreme Court that the states have authority to issue a blanket injunction against peaceful picketing and handbilling by unions to publicize substandard working conditions on the bare ground that there is a "valid state interest in the preservation of [its] local economy (App. p. 19a).

CONCLUSION

For the above stated reasons the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

[redacted]

[redacted]

[redacted]

SUBJECT INDEX

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
I. INTRODUCTION	3
II. NLRA PREEMPTION	4
III. CONSTITUTIONAL PROTECTION	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

LIST OF AUTHORITIES

CASES

	Page
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	5
Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, D.C. Cir. 1970, 429 F.2d 206, 1970	8
Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963)	5
International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970)	5
McCulloch v. Sociedad Nacional, Etc., 372 U.S. 10 (1963)	5
Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 99, 1972	7
Windward Shipping (London), Ltd., et al v. American Radio Association, AFL-CIO, et al, ____U.S.____, 39 L.Ed.2d 195 (1974)	2, 4

UNITED STATES CONSTITUTION

	Page
First Amendment	4, 7
Fourteenth Amendment	4

UNITED STATES STATUTES

	Page
29 U.S.C. 152, 157, 158	3

TEXT

	Page
Wright and Miller, Federal Practice and Procedure, Vol. 11, Sec. 2962	8

MISCELLANEOUS

	Page
Waterborne Commerce of the United States, Calendar Year 1972, Department of the Army, Corps of Engineers (1972)	3

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO
ET AL., *Petitioners,*

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
AND ROBERT E. MALONE, *Respondents.*

**ON CERTIORARI TO THE
SUPREME COURT OF ALABAMA**

BRIEF AS AMICI CURIAE OF:
West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association

STATEMENT OF INTEREST

The geographical focus of this case is on the Port of Mobile, Alabama where the litigation now before the Court began. But, the activities of Petitioners' which gave

rise to that litigation were not confined to that port. (Petitioner's Brief p. 2-4, *Windward Shipping (London), Ltd., et al v. American Radio Association, AFL-CIO, et al*, ___U.S.____, 39 L.Ed.2d 195, 1974). If Petitioners emerge from this case with a holding that those activities were and are protected from Congressional and Judicial restraint by the Federal Constitution, the practical effect will be to subject the economically feasible use of any United States port by a vessel flying the flag of another nation to the leave and consent of the Petitioner Unions.

Along the Atlantic shore from Cape Hatteras southward to Port Everglades and Miami and on the coast of the Gulf of Mexico from Tampa to the Rio Grande lie some of the nation's greatest ports. These *amici* are associations of virtually all owners, agents and stevedoring contractors operating in those ports. Included are Charleston, Savannah, Jacksonville, Miami, Port Everglades, Tampa, Pensacola, Baton Rouge, New Orleans, Lake Charles, Beaumont, Port Arthur, Orange, Houston, Galveston, Freeport, Corpus Christi and Brownsville, Texas.

The West Gulf Maritime Association alone numbers over 75 members in the Ports of Texas and Lake Charles, Louisiana, including owners of both United States and foreign flag vessels, agents who represent both domestic and foreign owners and stevedores who contract to load and discharge vessels regardless of flag.

The New Orleans Steamship Association represents similar interests at that great port, while members in Baton Rouge, Pensacola, Tampa, Southeast Florida, Jacksonville, Savannah and South Carolina perform such functions at the ports their names indicate.[1]

1. Tonnage at these Atlantic and Gulf ports, foreign and domestic, amounted to approximately 32% of the total waterborne commerce of the United States in the calendar year 1972, the last year for which such statistics are available. WATERBORNE COMMERCE OF THE UNITED STATES, CALENDAR YEAR 1972, Department of the Army, Corps of Engineers (1972).

It is to be noted that these associations represent virtually all of the owners, agents and stevedores in the ports indicated. Owning, representing and stevedoring, as they do, vessels, both foreign and domestic, the interests of the members diverge in many areas and they and their principals are in constant competition for maximum participation in water-borne foreign commerce but they are here united by a vital concern that such regulation as may be necessary with respect to that commerce will be prescribed solely by the branches of Government entrusted with the nation's trade and foreign policy and will not be delegated to the petitioning unions.

ARGUMENT

I.

Introduction

The last thing which a true friend of this Court ought to do is increase the number of times it must read and digest substantially the same thought or argument. Especially to be avoided by friends are those features of a case involving valid state or local considerations and procedures which local parties are far better able to present. The deep concern which these *amici* have in the issues here to be resolved may result in something short of complete adherence to these limiting tenets, but we will labor to achieve a maximum amount of forensic economy.

As we read their brief, Petitioners seek reversal based first, upon National Labor Relations Act (29 U.S.C. 152, 157, 158) preemption and, secondly, constitutional (Ar-

ticle VI, First and Fourteenth Amendments) protection. Our argument will respond to those two contentions in the order presented by petitioners.

II.

NLRA Preemption

The question of National Labor Relations Act preemption was nurtured carefully through the Courts of the State of Texas by these Petitioners and submitted full-blown to this Court in *Windward Shipping, supra*. Faced with the resulting adverse decision in that case, Petitioners appear to have cast about here for a factual difference upon which to forge a legal distinction. Indeed, even a factual difference is singularly hard to find. In each case the identical unions, pursuant to the same general plan, utilizing the same sign wording, leaflets and instructions against virtually identically situated vessels,[2] conducted the same type of picketing with the identical practical, economic and operational results. The fact that the picketing in *Windward* occurred in Houston and in this case in Mobile, is of no help, so that about the only remaining difference lies in the identity of the Plaintiff seeking the injunction.[3]

---

2. Although relegating discussion to footnote No. 5 on Page 18 of their brief, Petitioners allude to a potential difference of treatment between vessels owned entirely or substantially by foreign nationals and those vessels of foreign registry which are owned directly or indirectly by United States Citizens or corporations. It does not appear that Petitioners contend that the record in the case at bar provides the basis for a determination here of the legal effect of any such difference and, in any event, we believe that such an effort, for the reasons set out in Respondent Mobile's brief, would lead to the conclusion that no different result should obtain.

3. Our argument is limited to Petitioner's preemption argument as applied to the Mobile Steamship Association, Inc. We do not examine the force or validity of the additional contention that Respondent Malone's entitlement to injunctive relief is also preempted.

In these circumstances it is not difficult to understand why petitioners would urge that *Windward* denied preemption because of the identity of the Plaintiff. But this Court did not hold that the National Labor Relations Board had no jurisdiction because a foreign ship owner sought to enjoin the union's activity. Rather, it held that the NLRB had no jurisdiction because that union activity did not affect commerce and therefore was not within the preemptive scope of the Act. This Court did not say in the first paragraph of its opinion in *Windward* that the question was whether the fact that the Plaintiff was a foreign shipowner prevented preemption. Rather it said in that paragraph that the question was whether the Defendant union's activities affected commerce within the meaning of the applicable sections of the National Labor Relations Act, 29 U.S.C., Sec. 152 (6) and (7) and it held that they did not. The Court traced the policies underlying *Benz* and the subsequent decisions to which it lead,[4] emphasizing the underlying reasons for not subjecting picketing activities such as those found here and in *Windward* to resolution by the National Labor Relations Board:

a. The need for clearly expressed Congressional intention before the Court intrudes willy-nilly into the complex of considerations affecting foreign trade;

b. The impropriety of the Board's inquiring into the internal discipline and order of foreign vessels;

c. The reluctance to attribute to Congress an intention to disrupt a comprehensive body of sea law through

---

4. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional, Etc.*, 372 U.S. 10 (1963); *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

the construction of an act unrelated to maritime commerce; and

d. The dilemma of foreign ship owners which would result from any attempt to mollify American pickets by raising their seamens' wages, boycotting American ports, or fostering retaliatory action against American vessels in foreign ports.

Not a single one of these serious considerations upon which *Windward* and the cases it cites are rested is diminished or changed one iota by the fact that the Association is seeking injunctive relief to avoid the damage done to its members by Petitioners' activity, whether those members be foreign ship owners, the agents of foreign ship owners or the stevedores who have contracted to load or discharge foreign flag vesels. If the activity does not affect commerce, the jurisdiction of the State Court is not preempted and any party who has sufficient legal standing to invoke the injunctive power of the Court and can show himself entitled to relief under established principles of equity, should be entitled to receive it.

Finally, it should be noted that the makeup of associations such as these *amici* demonstrates the multiple interests which must combine in the furtherance of meaningful water-borne commerce. The assertion that Petitioner's activity is not "in commerce" if brought to the Court by one party which it is injuring, but is "in commerce" if brought into the same Court by another injured party, having equal judicial standing and equitable entitlements to injunctive relief, requires a conceptual and abstract approach far removed from the concrete, practical treatment given by this Court to the real and important problems which have arisen in this area.

III.

Constitutional Protection

A reading of the briefs of the parties leaves us with the conviction that there is no real difficulty in settling upon the applicable constitutional principles. While picketing may indeed involve "expressive conduct within the protection of the First Amendment" (*Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 99, 1972) even Petitioners recognize that such involvement does not render all state regulation of picketing constitutionally impermissible. It also seems to be recognized common ground that state regulation may properly extend to the prohibition of picketing which seeks the violation of a State's valid public policy or law. So, the constitutional argument appears to narrow quickly to the existence of a valid public policy or law which the Courts of Alabama were protecting by issuing the injunction. A corollary question is whether, assuming the existence of such a valid public policy or law, it can be said that the Supreme Court of Alabama sufficiently identified and enunciated it.

Respondents lucidly and forcefully catalogue the State policies which support, if not compel, the action of its Courts. Although those laws and policies, while local in the legal sense, are of pervading validity, we adopt the description of them offered by Alabama Counsel for Respondents and resist the temptation to indulge in repetitious paraphrasing.

For some reason, Petitioners repeatedly deride the concept that the order of a duly constituted Court may be presumed on appeal to have been based upon valid grounds. The statement to this general effect by the Alabama Supreme Court, in our view, is nothing more than the expression of a principle which should govern the initial approach of any reviewing court.

Such a presumption gains strength in virtually every jurisdiction as a tenet to be followed in the review of the decisions of trial courts granting or denying temporary injunctive relief. *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, D.C. Cir. 1970, 429 F.2d 206; Wright and Miller FEDERAL PRACTICE AND PROCEDURE, Vol. 11, Sec. 2962.

The practical reasons underlying the teaching of the authorities cited are multiple. First the appellate court should and does bear in mind that an order giving or denying temporary injunctive relief need not serve as a permanent resolution of all substantive issues dividing the parties. In addition, the Court from whom temporary injunctive relief is sought must act without a full and complete exposition of all possible facts and arguments which are available to the litigants. In truth, the Court cannot avoid acting because either of its alternatives—withholding or granting the relief—will affect the immediate interests of the parties. Therefore, the Court must strike a balance and it is Hornbook law that its discretion in doing this will not be lightly disturbed. Finally, in many instances the Court may not at this stage of the proceedings give a full, clear and complete expression of all of the policy considerations underlying its Order.

For these reasons, we regard as sound the comment of the Supreme Court of Alabama evidencing a belief that had the trial court not felt that a substantial law or public policy of that state was in jeopardy, the injunction would not have been granted. As the Respondents point out, upon a full hearing of the application for permanent injunction, the Courts below will have an opportunity to document and express more fully the considerations which necessitate any continuance of injunctive relief. Reaching the federal constitutional question at this stage of the

proceedings and utilizing it to void the decision below would be in conflict with this Court's traditional approach to this most serious task.

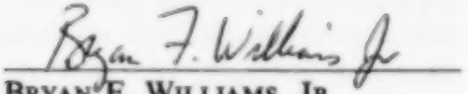
We conclude with a reference to Petitioners' attempt to state the conflict in terms of the union's right of free speech as opposed to the Respondents' property rights. The abstract philosophical appeal of this approach is apparent but it is nonetheless just that—abstract. In truth and fact, the controversy involves nothing more than an attempted exaltation of Petitioners' "property rights and their preservation" (p. 22, Petitioners' Brief) against the desire of Respondents to retain those property rights which they have. Petitioners went to great pains to regulate and minimize idea communication by its pickets and to prohibit absolutely their speech. It was not their wish to be able to verbalize their grievances. The plan, as candidly and honestly stated by the only witness offered by Petitioners (whose credibility, status and "authority" to speak is now impugned by them) was to enlist economic pressure in an effort to channel economic benefits to themselves. The motives and purposes of their conduct were quite clear and understandable, i.e., the obtaining of more "business" for American seamen. The method they selected, however, was contrary to the public law and policy of the State of Alabama and the Federal Constitution does not afford them the right to its continued use.

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

Dated: August 8, 1974.

Respectfully submitted,



BRYAN F. WILLIAMS, JR.

Counsel for:

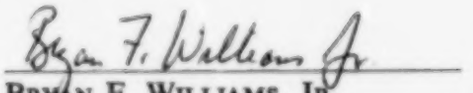
West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association,

As Amici Curiae
205 Cotton Exchange Building
Galveston, Texas 77550

CERTIFICATE OF SERVICE

I certify that on this 8th day of August, 1974, three copies of the within Brief *amici curiae* were mailed, postage prepaid to the counsel for the parties listed below.

I further certify that all parties required to be served have been served.



BRYAN F. WILLIAMS, JR.

Counsel for:

West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association,

As Amici Curiae
205 Cotton Exchange Building
Galveston, Texas 77550

Counsel for Petitioners:

Howard Schulman, Esquire
Schulman, Abarbanel & Schlesinger
350 5th Avenue
New York, New York 10001

Counsel for Respondents:

Frank B. McRight, Esquire
Armbrecht, Jackson & DeMouy
P. O. Box 290
Mobile, Alabama 36601

Alexander F. Lankford, III, Esquire
Hand, Arendall, Bedsole, Greaves & Johnson
30th Floor, First National Bank Building
Mobile, Alabama 36602

Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Petitioners,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF WESTWIND AFRICA LINE, LTD. AS *AMICUS CURIAE*

ROBERT S. OGDEN, JR.
JOSEPH E. FORTENBERRY
30 Rockefeller Plaza
New York, New York 10020
Counsel for Amicus Curiae

DONOVAN LEISURE NEWTON & IRVINE
of Counsel

INDEX

	PAGE
Consent of Parties	1
Interest of *Amicus Curiae*	1
Statement of the Case	2
Summary of Argument	4
Argument	5
Conclusion	15

Authorities Cited

Cases:

Amalgamated Food Employees Union v. ***Logan Valley Plaza***, 391 U. S. 308 (1968)	9
AFL v. ***Swing***, 309 U. S. 659 (1940)	5
American Radio Association v. ***Mobile Steamship Association***, 483 F. 2d 1 (5th Cir. 1973)	3
Bakery and Pastry Drivers v. ***Wohl***, 315 U. S. 769 (1942)	7
Building Services Union v. ***Gazzam***, 339 U. S. 532 (1950)	7
Edwards v. ***South Carolina***, 372 U. S. 229 (1963)	6
Giboney v. ***Empire Storage and Ice Company***, 336 U. S. 490 (1949)	7, 8, 9
Hughes v. ***Superior Court***, 339 U. S. 460 (1950)	7, 11

PAGE

Keefe v. *Organization for a Better Austin*, 115 Ill. App. 2d 236, 253 N. E. 2d 76 (1969) 5

Organization for a Better Austin v. *Keefe*, 402 U. S. 415 (1971) 5

Plumbers Union v. *Graham*, 345 U. S. 192 (1953) 7

Taggart v. *Weinacker's, Inc.*, 397 U. S. 223 (1970) 5

Teamsters Union v. *Hanke*, 339 U. S. 470 (1950), 11, 12, 13, 14

Thornhill v. *Alabama*, 310 U. S. 88 (1940) 6

Windward Shipping (London) Limited v. *American Radio Association*, 415 U. S. , 94 S. Ct. 959 (1974) 2, 12n

Constitution and Statutes:

U. S. Const. amend. I .....*passim*

U. S. Const. amend. XIV .....*passim*

29 U. S. C. § 160(l) 2

Other Authorities:

T. Emerson, The System of Freedom of Expression (1970) 7n

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877 (1963) 7n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF *AMICUS CURIAE*

Consent of Parties

All parties in this case have given their written consent to the filing of this brief. The written consents have been filed with the Clerk of this Court.

Interest of *Amicus Curiae*

Westwind Africa Line, Ltd. is a Liberian corporation engaged in the business of international shipping between various foreign countries and the United States. It owned

the Liberian flag vessel Northwind, which was picketed in the Port of Houston, Texas, and was one of the parties before this Court in the case arising out of that picketing, *Windward Shipping (London) Limited* v. *American Radio Association, AFL-CIO*, 415 U. S. , 94 S. Ct. 959 (1974). *Windward Shipping* held that the jurisdiction of a state court to rule on an application by the owners of foreign flag ships for injunctive relief against picketing identical to the picketing in this case, but which occurred in another port, was not pre-empted by the Labor-Management Relations Act.

Westwind Africa Line, Ltd., and all other foreign owners of foreign-flag vessels, are vitally interested in the outcome of this litigation because it presents the issue, not reached in the *Windward Shipping* case, of federal constitutional limitations on the power of the States to regulate picketing of foreign flag vessels. Since this is the nature of Westwind Africa Line Ltd.'s interest, this brief does not discuss the pre-emption question raised by petitioners but is addressed to the issues raised in part II of petitioners' brief relating to picketing and the free speech protections of the First and Fourteenth Amendments to the Constitution.

Statement of the Case

The Picketing

A strike by the International Longshoremen's Association (ILA) shut down the port of Mobile on October 1, 1971. The NLRB instituted proceedings in the United States District Court to secure a restraining order under Section 10(l) of the Labor Act (29 U. S. C. §160(l)). The District Court advised the parties that the injunction would issue on November 3, 1971. On the same date

petitioner seamen's unions established the picket line which is in issue in this case (App. 68a-70a).*

The pickets patrolled initially at the gates of the Alabama State Docks and subsequently at the gangways of the foreign flag ships (App. 6a-7a). The effect of the picketing was to cause longshoremen not to cross the picket lines and not to load or unload the ships (App. 8a-9a). It prevented the members of the Mobile Steamship Association from carrying out their agreements with the shipowners to load and unload the ships (App. 72a-75a). There was ample evidence to suggest that, notwithstanding the language of the picket signs and the fact that they were addressed "to the public," the purpose and intention of the picketing was to prevent foreign ships from being loaded or unloaded in the port of Mobile.

The Litigation

After a hearing in which evidence was submitted chiefly in the form of affidavits, the Circuit Court of Mobile County issued an order providing that a temporary injunction would issue upon the complainants' posting a bond of $5,000 conditioned to pay all damages and costs of the unions if the injunction were dissolved. The court made no findings of fact or conclusions of law. The unions did not seek a full hearing or a final judgment, nor have they moved to dissolve or modify the temporary injunction. Instead they appealed the interim order. They also applied in the Federal district court for an order restraining the state court proceedings. The Federal district court denied the application, and the United States Court of Appeals for the Fifth Circuit affirmed. *American Radio Association* v. *Mobile Steamship Association, Inc.*, 483 F. 2d 1 (5th Cir. 1973).

---

* All "App." references are to the Appendix in this case.

The Supreme Court of Alabama affirmed the granting of the temporary injunction, 291 Ala. 201, 279 So. 2d 467 (1973). On the constitutional question, it determined that the lower court could validly consider the economic effects of the picketing and stated:

> "We have no reason to assume otherwise than that the trial judge, in the exercise of the wide discretion accorded him in a matter of this kind, gave close heed to the issues involved, and concluded that while a substantial question remained to be decided, the immediate circumstances obliged him to order the temporary writ." 279 So. 2d at 476.

Without attempting to second guess the trial court as to the precise basis of the possible wrongfulness of the picketing, the Supreme Court of Alabama held, after reviewing the evidence, that the trial court had not abused its discretion by issuing the temporary writ.

Summary of Argument

The temporary nature of the relief granted, and the absence of a trial court opinion reciting either the facts found or the legal conclusions reached, make this an inappropriate occasion for the resolution of important First Amendment questions.

Picketing which involves pure communication is entitled to protection as speech. Picketing which serves as a signal for the application of economic pressure to those picketed is action, and is no more entitled to free speech protection than any other type of action. Given the meager record in this case, it is impossible to determine that the picketing was pure communication, and impossible, therefore, to conclude that the Alabama courts could not temporarily enjoin the picketing without running afoul the federal constitution.

ARGUMENT

I

This Court should not consider the constitutional questions of this case in the absence of a full record and a final judgment.

We believe that this case is not at a stage where this Court should rule on the constitutional power of the Alabama courts to restrain the picketing in question because there is no final judgment and no findings of fact or conclusions of law on which to make such a ruling. *See AFL* v. *Swing*, 309 U. S. 659 (1940) (in which this Court denied certiorari at a stage of that case where a temporary injunction had issued but no final judgment) and *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223 (1970).

The case at bar differs significantly from *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), where this Court did review a temporary injunction which had been issued after a full hearing and which was accompanied by detailed findings of fact by the trial court. *See Keefe* v. *Organization for a Better Austin*, 115 Ill. App. 2d 236, 253 N. E. 2d 76, 78-79 (1969). This Court noted in *Keefe* that there was no "indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." 402 U. S. at 418 n.

In the present case there are facts in dispute, particularly as regards the purpose of the picketing, and the issuance of a permanent injunction either with the same

wording as the temporary injunction or with different wording, is not a foregone conclusion.

The constitutional question should be resolved only after the benefit of a full hearing and a final order based on conclusions of fact and law.

II

The picketing in the case at bar is not constitutionally protected free speech.

It is clear that a generic prohibition of picketing violates the First and Fourteenth Amendments of the Constitution. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). It is also clear that picketing which involves pure publicity or communication and nothing more is entitled to the same protection as speech. An example of such picketing is peaceful picketing of a state capital in support of civil rights. *See Edwards* v. *South Carolina*, 372 U. S. 229 (1963). On the other hand, picketing by organized labor ordinarily (but not always) involves something more than communication. Frequently the communication aspect of picket signs is realistically irrelevant and the purpose of labor picketing is to cause organized labor to boycott the target employer and through such economic pressure, rather than through any appeal to the rational processes of the public, to achieve the union's goal. The economic pressure is possible because of long standing customs of solidarity and discipline within the labor movement backed by taboos against crossing picket lines, by fear of violence or social ostracism and by the fact that a union member who crosses a picket line is normally subject to fines and other discipline by his union. Thus a union picket line is ordinarily a boycott signal when it is located in the path of union labor providing supplies or services to the

target employer, quite irrespective of the contents of the picket signs.*

The starting point for the consideration of state power over picketing as conduct is the often-cited concurring opinion of Mr. Justice Douglas in *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769, 776-777 (1942):

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

This language was followed and expanded on in the later cases of *Giboney* v. *Empire Storage and Ice Company*, 336 U. S. 490 (1949); *Hughes* v. *Superior Court*, 339 U. S. 460, 464-465 (1950); *Building Services Union* v. *Gazzam*, 339 U. S. 532 (1950); *Plumbers Union* v. *Graham*, 345 U. S. 192, 201 (1953).

---

*". . . (T)here is a fundamental difference between most labor picketing and most non-labor picketing. Labor picketing normally has a special kind of economic impact, derived from its institutional setting. An employer who is picketed is usually sealed off from many economic contacts by the tradition that union labor will not cross the picket line. This form of pressure is applied by closely knit, powerful organizations, with membership in the thousands or hundreds of thousands and a nationwide network of affiliates. It is supported by a system of power based upon common economic interests, loyalties, social pressure, economic sanctions, and bureaucratic force. A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage, based upon an already prepared position. As such it must, under ordinary circumstances, be classified as action, rather than expression.

T. Emerson, The System of Freedom of Expression 445 (1970). See also Emerson, *Toward a General Theory of the First Amendment* 72 Yale L. J. 877, 939 (1963).

In *Giboney* this Court stressed the effect of the picketing on the target employer:

> "About 85% of the truck drivers working for [the employer's] customers were members of labor unions. These union truck drivers refused to deliver goods to or from [the employer's] place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member."
>
> "Because of the foregoing . . . the picketing had an instantaneous adverse effect on [the employer's] business. It was reduced 85%." 336 U. S. at 493.

The Court concluded that:

> "[The union's] power with that of their allies was irresistible. And it is clear that [the unions] were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel [the employer] to abide by union rather than state regulation of trade." 336 U. S. at 503.

In no case involving utilization of a union's economic power to trigger a boycott of organized labor wherein unionized employees of third parties refuse to service the business needs of the target employer has this Court declined to uphold restrictions on picketing the purpose or effect of which conflicts with federal or state policy. This Court, moreover, has never held that a state or federal government is constitutionally barred from making conduct illegal merely because it involves speech.

> ". . . (I)t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney, supra,* 336 U. S. at 502.

Where, on the other hand, labor picketing has involved substantially pure communication, without the signal effect referred to by Professor Emerson of initiating a boycott of the target employer by organized labor, or where state regulation is applied to restrict pure communication picketing, this Court has been particularly careful to balance the social or economic policy behind picketing limitations against the degree by which the pure communication element of picketing is restricted in the particular circumstances. See *e.g., Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968).

Petitioners argue in point II of their brief that the picketing in this case involved nothing more than an appeal to the public to "ship American" * and as such constituted the lawful exercise of protected fundamental rights of free speech. If the picketing had been nothing more than an appeal to the public, and if it had not had the intended and actual effect of triggering an immediate refusal by longshoremen to cross the picket lines and load or unload the ships, we would agree with Petitioners.

Petitioners assert that the picketing in this case is identical to that in *Logan Valley Plaza, supra,* where this Court held that the state's trespass laws could not be applied in such a way as to prevent the communication of ideas to patrons of a supermarket. But the picketing in *Logan Valley Plaza* took place in the parcel pickup area frequented by customers and its sole purpose was to ask

---

* In the light of Mr. Neira's testimony cited by the Alabama Supreme Court and the statements of the unions' lawyer at the hearing, (App. 128a-129a) this assertion is at best open to dispute.

customers not to patronize the store. Nothing in the opinion suggests that it was intended to or that it did interfere with services provided by union labor to the store. It was not a signal to organized labor to cease performing services for or making deliveries to the store.

The record in the case at bar contains ample evidence from which a court could conclude that the purpose of the picketing in Mobile, notwithstanding the language on the picket signs, was to block foreign ships from being loaded or unloaded so that shippers would be forced to use American vessels unless at least the foreign shipowners were to raise the wages of their foreign crew to American levels. This may or may not be conduct which it is wise for a state or indeed the federal government to regulate, but on such a finding, the speech element could realistically be viewed as immaterial and might even be viewed as an attempt by careful planning of details by the unions to bring under the protective mantle of free speech economic conduct which would otherwise clearly be susceptible of regulation.

Petitioners have argued that a prerequisite for state regulation of picketing is that such regulation must seek to implement a valid public policy and that the action of the Alabama courts is invalid because they did not define the public policy involved (Pet. brief, p. 22).

We submit that, within the framework of this Court's previous decisions, a state is free to develop either by the judicial process or by legislation its policies regarding the lawfulness or unlawfulness of picketing in particular circumstances. We believe that this Court's approach to the constitutional question in this case should be tempered by the fact that the case involves merely an interim order and that the courts of the State of Alabama should have the opportunity of expressing that State's policy in a

final judgment containing conclusions of law and findings of fact.

We believe that the Alabama court was constitutionally justified in upholding the granting of a temporary injunction in the circumstances. The fact that the lower court did not make findings of fact or conclusions of law in the interim proceedings did not provide the Alabama Supreme Court, nor does it provide this Court, with any basis for concluding that there is no valid policy on which the Alabama courts could properly render a final judgment enjoining the picketing in this case.

In *Hughes* v. *Superior Court, supra,* this Court made it clear that it would not try to establish the constitutional boundary line between the competing interests of society involved in the use of picketing with general phrases, (339 U. S. at 466) and that a state has great discretion within the Constitution in determining whether to regulate picketing and, if so, what form and scope the regulation should take. *Hughes* makes clear that it is constitutionally immaterial whether a state's policies are formulated and defined by its courts or by its legislature. *Id.* at 466-468.

Of all the cases decided by this Court concerning the relationship between picketing and free speech, none is more relevant to the case at bar, both in the context of its factual setting and in the guidance to be derived from the majority opinion written by Mr. Justice Frankfurter, than *Teamsters Union* v. *Hanke*, 339 U. S. 470 (1950). In that case, the union picketed in protest that two self-employed car dealers were keeping their business open beyond the business hours which the union had negotiated with other car dealers.* The picketing was peaceful, but

* Such picketing has many similarities with the picketing in the case at bar, where the unions were protesting that the wages paid to foreign crews on foreign ships were less than those negotiated by the union with the owners of American ships.

it triggered a refusal by drivers for supply houses to deliver parts and other needed material to the car dealers.

This Court stated:

> "Here, as in *Hughes* v. *Superior Court* . . ., we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. . . . The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants'. . . . A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment comes to this Court bearing a weighty title of respect." *id.* at 474-75.

The opinion went on to comment that the case presented a glaring instance of the interplay of social-economic interests. "On the one hand Unions obviously are concerned not to have union standards undermined by non-union shops." *id.* at 475.* On the other hand there was an interest in preserving the economic units against whom the picketing was directed.

> "Whether to prefer the union or the self-employer in such a situation, or seek partial recognition of

* The unions in the *Windward Shipping* case contended that the picketing in that case, which was identical to that in the case at bar, was essentially area standards picketing to protest that foreign ships paying lower wages were undermining the standards of American seamen on American ships. See *Brief for Respondents in Opposition* in that case pp. 10-12.

> both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of [the *Senn* case]" *id.* at 475-76.

The Court held:

> ". . . we cannot conclude that [the state], in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that [the state] has offended the Constitution" *id.* at 478-79.

We think that it would be within the constitutional power of Alabama, or of the Federal government, to regulate and restrain any picketing which is intended to and does have the effect of triggering a boycott by organized labor which causes unionized employees of third parties to refuse to service the business needs of the target employer. We see no essential constitutional difference between a government's right to regulate the initiation of boycotts arising from an understanding between union allies and its undoubted right to regulate the initiation of boycotts arising from an understanding between business allies. This is what Alabama was doing when it temporarily enjoined picketing conduct which interfered with the contractual relationships between the stevedoring companies and the foreign shipowners. The interference

involved in the case was that the picketing of the ships triggered a boycott by the unionized longshoremen, who refused to load or unload the ships. Had the picketing merely involved an appeal to shippers not to patronize foreign ships, without an intended triggering effect on organized labor, the constitutional situation would have been very different.

We believe that a state or federal government could constitutionally prohibit so-called "area standards" picketing which triggered such a boycott on any number of valid social or economic considerations: for example, the harm done to the target employer, its employees, or competition generally; or that such picketing is inconsistent with the right of the employees of the target company and their own union, if they have joined one, to negotiate their own wage structure without interference by an outside union. The solution to such questions is, in the words of Mr. Justice Frankfurter in *Hanke*, "a challenge to wisdom and not a command of the Constitution."

Similarly, Alabama courts could determine that the social and economic interests of the state in having foreign ships trading in and out of its ports, carrying the produce of its citizens to market and bringing in the products needed by its citizens, outweighs the interest of American seamen's unions in causing these ships to be boycotted by longshoremen and other union labor because the wages paid to the foreign crews on such ships are less than those of American seamen. In the present case the Alabama courts could find that the communication element of the picketing was not a material element in the light of the evidence of its purpose and effect and the circumstances in which it took place, including the fact that the commencement of the picketing coincided precisely with the announcement by the Federal district court that an in-

junction would be issued against a strike being carried on by the very longshoremen who then refused to cross the picket lines established by the seamen's unions.

Conclusion

We submit that the granting of the preliminary injunction should be affirmed and that the case should be remanded for further proceedings. We do not believe that this Court should rule on the constitutional questions until such time as the case reaches the stage of a final judgment in which the basis of the Alabama policy is set forth.

Respectfully submitted,

ROBERT S. OGDEN, JR.
JOSEPH E. FORTENBERRY
30 Rockefeller Plaza
New York, New York 10020

Counsel for Amicus Curiae

DONOVAN LEISURE NEWTON & IRVINE
of Counsel

Dated: New York, New York
August 8, 1974

Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

—v.—

MOBILE STEAMSHIP ASSOCIATION, INC.,

—and—

ROBERT E. MALONE,

Respondents.

ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

FRANK L. WISWALL, JR.
Counsel for the Republic of Liberia as amicus curiae
103 Park Avenue
New York, N. Y. 10017

INDEX

PAGE

Table of Authorities ii

Statement of Interest 1

Opinions Below 2

Question Presented 2

Treaty Provisions Involved 3

Statement of the Case 5

Summary of Argument 5

ARGUMENT:

I. Introduction 6

II. The individual and collective actions of Petitioners and their members violate the FCN Treaty 9

III. The actions of Petitioners and their individual members in the instant case are neither sanctioned nor protected by the First Amendment 13

CONCLUSION 15

Certificate of Service 16

Table of Authorities

PAGE

Cases:

Baines v. City of Danville, Va., 337 F.2d 579 (4 Cir. 1964), *cert. den.* 381 U.S. 939 14

Bridges v. Davis, 443 F.2d 970 (9 Cir. 1971), *reh. den.* 445 F.2d 1401, *cert. den.* 405 U.S. 919 14

Brown v. Duchesne, 60 U.S. (19 How.) 183 (1856) 10

Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969), *aff'd* 396 U.S. 277 14

Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852) 11

Sullivan et al. v. Kidd, 254 U.S. 433 (1921) 12

Twin Falls Construction Co. v. Operating Engineers Local No. 370, 95 Idaho 370, 509 P.2d 788 (1973) 14

United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865) 9

Constitutional Provision:

United States Constitution

Article VI, cl. 2 8

Amendment I 5, 13-15

Amendment XIV 14

PAGE

Statutes:

54 Stat. 1739 3-5

[Treaty of Friendship, Commerce and Navigation Between the United States and Liberia. Signed at Monrovia, August 8, 1938]

Article I 3

Article VII 3, 6, 7

Article XIV 4, 6

Article XV 4, 6

Article XVI 4, 6, 7-8

54 Stat. 1750 (1941) 12

[Proclamation of President Roosevelt dated November 13, 1939, publishing the terms of the Treaty]

Other Authorities:

Jay, *The Federalist*, No. LXIV 8

In the

Supreme Court of the United States

October Term, 1973

No. 73-748

American Radio Association, AFL-CIO, *et al.*,

Petitioners,

—v.—

Mobile Steamship Association, Inc.,

—and—

Robert E. Malone,

Respondents.

ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

Statement of Interest

The interests of the Republic of Liberia in this case are limited, but nonetheless important. Petitioners would blockade Liberian vessels from American ports—at least until Petitioners were assured freedom from economic competition by Liberian (and other) vessels not subject to their hegemony. But Liberian vessels are entitled to compete for the carriage of goods to and from the United States

and this freedom of competition, reciprocal with the same freedom to United States vessels trading to Liberia, is guaranteed by a long-standing mutual treaty between the two nations. It is the position of the Republic of Liberia that Petitioners' actions, and those of their individual members, constitute a transgression of treaty rights which is not sanctioned or protected by the Constitution of the United States but, on the contrary, is in violation of the law of this land.

Accordingly, the Republic of Liberia requests the permission of the Court to appear herein and to submit the following brief in the capacity of *amicus curiae*. Both Petitioners and Respondents have consented to the filing of this brief.

The Republic of Liberia respectfully urges this Honorable Court to affirm the judgment of the court below.

Opinions Below

The opinions and orders of the courts below appear at pp. 5a-30a of the Appendix to the Petition for Certiorari herein.[1]

Question Presented

Whether the calculated actions of Petitioners, claimed by them to be "informational" only but so carried out as to abridge rights guaranteed by international treaty, are sanctioned or protected by the freedom of speech clause of the First Amendment to the Constitution of the United States.

[1] All such "a" page references following are to the Appendix to the Petition.

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND LIBERIA. SIGNED AT MONROVIA, AUGUST 8, 1938. (54 STAT. 1739.)

ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted . . . to engage in . . . commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; . . . and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it . . . .

. . . . . .

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

. . . . . .

ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Article XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

Article XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Article XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the

same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

Statement of the Case

The Republic of Liberia adopts the statement of the case appearing in the Brief of Respondents.

Summary of Argument

The United States and Liberia have reciprocal Treaty obligations to ensure freedom of commerce and navigation each to the other's vessels and cargoes. Petitioners and their members, as individual citizens of the United States, are bound to honor the Treaty obligations and to take or cause to be taken no action for the purpose of impairing rights guaranteed by the Treaty. The action of Petitioners in the case at bar is deliberately calculated to impair Treaty rights, and constitutes as well a wrongful interference with the rights of Respondents. Petitioners' conduct is therefore unlawful and is not sanctioned or protected by the First Amendment. The judgment of the court below is correct and should be affirmed.

ARGUMENT

I.

Introduction

Alcon Ltd., owner of the S/S AQUA GLORY (Official Number 2768), is a Liberian corporate national;* as such, it is entitled to the rights and protections guaranteed by the United States under treaty obligation—even as, in the past, the same rights and protections have been extended by Liberia to corporate nationals of the United States.

The treaty here drawn into principal consideration is the Treaty of Friendship, Commerce and Navigation (hereafter "FCN") between the United States and Liberia signed at Monrovia on August 8, 1938. The Treaty is completely reciprocal in its terms, and was drawn to accommodate subsequent changes in maritime circumstance, though at that time the maritime power of Liberia was very small, and that of the United States very great. Liberia, then as now, was a country rich in natural resources which were beginning to be exported in quantity; the only means of such commerce being the sea, the potential benefit to American Flag shipping was obvious.

The effect of this Treaty was to open up the commerce of Liberia to the United States on a most-favored nation basis. But beyond "most-favored-nation" clauses, certain explicit rights in respect of navigation and merchant shipping were granted by each Party to the other; those most relevant to this case are contained in Articles VII, XIV, XV, and XVI, which are set out *supra* pp. 3-5.

* Indeed, the vessel is guaranteed her rights by the Treaty irrespective of her ownership; see Article XV and also Articles XIV and XVI of the FCN Treaty, *supra* pp. 4-5.

The issue in this case is of absolutely crucial international importance. A treaty right ignored is a treaty right abrogated; and a treaty obligation ignored becomes no obligation at all. Nowhere are such treaty questions more important than here, where the national security and international commerce of the contracting Parties are directly and obviously affected by the outcome.

A substantial percentage of imports to, and exports from, the United States of America are carried by Liberian vessels, pursuant to the FCN Treaty. If vessels of the Republic of Liberia may actually be blockaded by Petitioners from ports of the United States of America, the result must be that both the economies of Liberia and the United States will suffer.

But the vital questions of law, both domestic and international, overshadow even the considerable economic impact. For the Treaty here in question between the United States and Liberia undertakes that:

> ". . . there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties . . . shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation."[1]

and that

> "Merchant vessels . . . under the flag of either of the High Contracting Parties *shall be permitted to discharge* portions of cargoes at any port open to for-

[1] Article VII.

eign commerce in the territories of the other High Contracting Party . . . and they *shall be permitted to load* in like manner at different ports in the same voyage outward . . . ."[2]

A classic exposition of the nature of treaties and their status as the supreme law of the land under the Constitution[3] is that of John Jay in *The Federalist,* No. LXIV:

> "Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as

[2] Article XVI. Italics supplied.

[3] Constitution of the United States of America, Article VI, cl. 2.

> they will be at any future period or under any form of government."

Put another way, the sanctity of a treaty rests upon a pledge made before the world by the States party to it that it is a solemn contract, made for consideration, which each commits itself to uphold and which each may hold the other to.

II.

The individual and collective actions of Petitioners and their members violate the FCN Treaty.

It is, of course, one of the "facts of life" in the maritime commercial world of today that American seamen enjoy, by far, the highest wage scale in the industry. In that sense, alone, the wages of the crews of every non-American merchant ship in the world are "substandard." Petitioners have created a situation in which their wage scale is far from standard and is inflated to a non-competitive level. They would therefore blockade the navigation and maritime commerce of Liberian vessels having competitive wage scales—by actions which are intended and designed to curb the free and effective access of ships of a friendly foreign government to United States ports, working a severe disruption if not a cessation of this foreign commerce; for as stated by this Court in *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 417 (1865):

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals."

It is also a fact that the actions and objectives of Petitioners (including here, as elsewhere in this brief, their

individual members) in this case are discriminatorily directed at merchant vessels and cargoes of the Republic of Liberia, both as compared to those of the most favored of other foreign nations and to American Flag vessels and cargoes themselves (6a-8a).

A similar ability to disregard treaties guaranteeing freedom of commerce and navigation was once asserted on behalf of certain patentholders; but as this Court said, in *Brown* v. *Duchesne,* 60 U.S. (19 How.) 183 (1856), at 197-198:

> "The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations. . . . And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual."
>
> ". . . [T]he Government would be unable to carry into effect its treaty stipulations without the consent of the patentee. . . . The same difficulty would exist in executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power. . . ."

The deliberate disruption by Petitioners of the navigation and commerce of Liberian vessels is, *ipso facto,* in violation of the FCN Treaty.

The most authoritative general pronouncement on the binding effect of treaty provisions on private citizens was made by Chief Justice Taney in *Kennett* v. *Chambers,* 55 U.S. (14 How.) 38 (1852), at 49-50:

> "The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the

scope of this delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made."

Moreover, the duty and obligation of individual citizens of the United States to abide by the letter and spirit of the FCN Treaty with Liberia was declared in the Proclamation of President Roosevelt dated November 13, 1939, publishing the terms of the Treaty. 54 Stat. 1750 (1941).

> "Now, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and *every article and clause thereof may be observed and fulfilled with good faith by* the United States of America and *the citizens thereof.*" (Italics supplied.)

In considering the force and effect of this Proclamation it must be borne in mind that in the area of treaty construction, the interpretations made by the executive are entitled to great weight before the courts. *Sullivan* v. *Kidd,* 254 U.S. 433, 442 (1921).

This FCN Treaty, unmodified by the Parties and unaltered in its effect, stands as the supreme law of the land. The actions of Petitioners are in direct violation of this Treaty and of that law.

III.

The actions of Petitioners and their individual members in the instant case are neither sanctioned nor protected by the First Amendment.

As Petitioners' brief seems at pains to point out (pp. 4-7), the picketing campaign was planned in detail, with extreme care, at the highest national level of Petitioners' organizations. Petitioners' "Committee of American Maritime Unions" even prepared and distributed from a central location a kit of carefully worded picket signs, pamphlets and instructions to local union representatives. The printed instructions (Petitioners' brief, pp. 6-7) refer to "publicity picketing"—yet one is struck by certain of the particular instructions, *e.g.,* number 3: "Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet." Or number 4: "If anyone asks . . . whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet." Or number 5: "In response to any inquiries . . . refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More."

Plainly, there was something about this "publicity picketing" concerning which Petitioners wanted no publicity at all—even to the ironical degree that free speech by the pickets themselves had to be restrained. From later evidence it is both logical and fair to conclude that what Petitioners feared to publicize was a most hoped-for effect of their campaign, the blockading of the vessels named on the picket signs. In order to achieve this, Petitioners were willing to bring the business of entire ports to a stop and to

interdict the flow of interstate and international commerce (20a-21a, 24a).

This conduct constituted a treaty violation by Petitioners as to the AQUA GLORY and her owner and was thus unlawful, but it was also a wrongful interference with the rights of Respondents to carry on their businesses. When Petitioners' covert purpose was revealed to the trial court it issued a preliminary injunction in conformity with the law of Alabama, which order has been sustained by the highest court of that State.

Petitioners now bring to this Court the argument, reduced to its essentials, that so long as the picketing was informational and peaceful it was protected by the First Amendment to the Constitution, as made applicable by the Fourteenth Amendment. But the matter is not that simple where, as here, there was not merely an informational but also a disguised purpose, which had as its objective an unlawful and a wrongful interference with the rights of others. Numerous cases carried to this Court have made it clear that the First Amendment is not a license to abridge the rights of others; see, *e.g., Baines* v. *City of Danville, Va.*, 337 F.2d 579 (4 Cir. 1964), *cert. denied*, 381 U.S. 939. It has been made equally clear that not all conduct claimed to have a communicative purpose is protected by the First Amendment; see, *e.g., Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969), *aff'd*, 396 U.S. 277. Surely, where "publicity picketing" is carried out not only for the purpose of information but also to achieve unlawful and wrongful objectives, it may safely be enjoined without infringement upon the free speech guarantee of the First Amendment[1]—particularly where, as here, it would have been an easy matter for Petitioners to arrange purely informational picketing which

[1] See *Twin Falls Construction Co.* v. *Operating Engineers Local No. 370*, 95 Idaho 370, 509 P.2d 788 (Sup. Ct. 1973). On the question of pubic policy, see *Bridges* v. *Davis*, 443 F.2d 970 (9 Cir. 1971), *reh. denied* 445 F.2d 1401, *cert. denied* 405 U.S. 919.

did not actuate, or incite others to give effect to, their contrived blockade.

Petitioners cannot hold the First Amendment of the American Constitution before them as a screen for otherwise unlawful and wrongful conduct.

CONCLUSION

The judgment below should be affirmed.

Dated: August 8, 1974

Respectfully submitted,

FRANK L. WISWALL, JR.
Counsel for the Republic of Liberia as amicus curiae
103 Park Avenue
New York, N. Y. 10017

Certificate of Service

I hereby certify that on this 8th day of August, 1974, three copies of the within Brief *amicus curiae* were mailed, postage prepaid, to Counsel for the parties listed below. I further certify that all parties required to be served have been served.

FRANK L. WISWALL, JR.
Counsel for the Republic of Liberia as amicus curiae
103 Park Avenue
New York, N. Y. 10017
(212) 683-2030

Counsel for Petitioners:

HOWARD SCHULMAN, Esquire
SCHULMAN, ABARBANEL & SCHLESINGER
350 5th Avenue
New York, New York 10001

Counsel for Respondents:

FRANK B. MCRIGHT, Esquire
ARMBRECHT, JACKSON & DEMOUY
P. O. Box 290
Mobile, Alabama 36601

ALEXANDER F. LANKFORD, III, Esquire
HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSON
30th Floor, First National Bank Building
Mobile, Alabama 36602

FILED
SEP 30 1974

No. 73-748

In the Supreme Court of the United States

OCTOBER TERM, 1974

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL.,
PETITIONERS

v.

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MALONE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
ROBERT E. KEUCH,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530

INDEX

	Page
Interest of the United States	1
Statement	2
Discussion	5
Conclusion	12

CITATIONS

Cases:

Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U.S. 740	10
Automobile Workers v. *Russell*, 356 U.S. 634	10
Benz v. *Compania Naviera Hidalgo*, 353 U.S. 138	4
Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369	7
Grain Elevator Workers, Local 418 v. *National Labor Relations Board*, 376 F. 2d 774, certiorari denied, 389 U.S. 932	8
Hanna Mining Company v. *Marine Engineers Benevolent Ass'n.*, 382 U.S. 181	11
Incres Steamship Company v. *Maritime Workers*, 372 U.S. 24	4
International Association of Machinists v. *Gonzales*, 356 U.S. 617	10
International Longshoremen's, Local 1416 v. *Ariadne Shipping Co.*, 397 U.S. 195	11
Linn v. *Plant Guard Workers*, 383 U.S. 53	10
McCulloch v. *Sociedad Nacional*, 372 U.S. 10	4
Moore Drydock, 92 NLRB 547	8
National Woodwork Manufacturers v. *National Labor Relations Board*, 386 U.S. 612	7
Retail Clerks v. *Schermerhorn*, 375 U.S. 96	9

559-320—74——1

Cases—Continued

	Page
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236	8, 11
Smith v. *Evening News Assn.*, 371 U.S. 195	10
Vaca v. *Sipes*, 386 U.S. 171	10
Windward Shipping (London) Ltd., et al. v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104	1, 2, 5, 9, 11, 12
Statutes:	
Labor Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C., 141, *et seq*	5
Section 301, 29 U.S.C. 185	9
Section 303, 29 U.S.C. 187	9
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B)	6, 7, 8, 9, 11
Section 14(c), 29 U.S.C. 164(c)	10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MALONE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This memorandum addresses the threshold issue of preemption in the case. We submit it because of the importance of that question to the government, including the National Labor Relations Board and the Department of State, which subscribe to the views expressed here.

As in *Windward Shipping (London) Ltd., et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104, the decision in the present case could have

important consequences for United States trade and could create serious problems in United States foreign relations. Picketing that prevents the loading or unloading of foreign-flag ships in United States ports could be severely disruptive of the United States economy, since foreign-flag ships carry close to 95 percent by tonnage (and 81 percent by value) of all United States waterborne trade, including 95 percent of waterborne deliveries of petroleum products.

STATEMENT

Except in one important respect—the character of the complaining party—this case is identical to *Windward Shipping, supra.*

The vessel *Aqua Glory* is a ship of Liberian registry which carries cargo between United States and foreign ports. The crew and officers of the vessel are foreign nationals (Pet. App. 8a). On November 3, 1971, while the *Aqua Glory* was docked at the Port of Mobile, Alabama, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established a picket line in front of the vessel. Four pickets carried signs which read (Pet. App. 6a):

> ATTENTION TO THE PUBLIC. THE WAGES AND BENEFITS PAID ABOARD THE VESSEL SS AQUA GLORY * * * ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARD AND THE LOSS OF OUR JOBS.

> PLEASE DO NOT PATRONIZE THESE VESSELS. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSELS AT THIS SITE.
>
> [Printed names of the six unions]

The pickets did not speak to anyone. Instead, they handed out literature which read (Pet. App. 7a):

> TO THE PUBLIC:
>
> American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> Our dispute here is limited to the vessel picket at this site, the SS * * *.

The names of the unions again appeared at the bottom of the leaflets.

No labor dispute existed between the owners of the *Aqua Glory* and their crew or the foreign unions

representing the crew while the picketing took place. The picketing was peaceful (Pet. App. 8a).

As a result of the picketing, longshoremen and other workers refused to service the vessel (Pet. App. 9a). This triggered the present suit, initiated by the Mobile Steamship Association, a non-profit corporation whose members include stevedoring companies and agents representing steamship companies. The Association asked an Alabama state court to enjoin the picketing on the grounds that the unions had unlawfully interfered with the contractual relationship between Association members and the companies operating the picketed vessels, and with the Association members' right to carry on their lawful business (Pet. App. 37a–39a). Shortly thereafter, respondent Malone intervened. He grows soybeans which are delivered to grain elevators at the docks and then loaded aboard vessels for export, and he claimed that the unions' activity similarly interfered with his right to carry on his lawful business (Pet. App. 6a).

The Alabama Circuit Court preliminarily enjoined the picketing (Pet. App. 28a–30a). The Alabama Supreme Court affirmed, 291 Ala. 201, 279, So. 2d 467, relying upon *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10; and *Incres Steamship Company* v. *Maritime Workers*, 372 U.S. 24. The appellate court stated that "[t]he dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of these vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case

are matters affecting international relations and not properly for NLRB jurisdiction" (Pet. App. 14a). Accordingly, the conclusion was reached that the Alabama courts were not preempted from entertaining the suit by the Labor Management Relations Act of 1947, 29 U.S.C. 141, *et seq.*

DISCUSSION

The obvious first question in the case is: Does *Windward Shipping* resolve the issue whether the state courts properly entertained jurisdiction of this suit? We submit that it does, subject to one qualification.

1. Both cases involve picketing of a foreign vessel by American unions, calling attention to the adverse consequence for domestic seamen of the lower wages paid foreign seamen, and asking all those in a position to do so to boycott the foreign vessel. In form, in purpose, and in effect, the picketing in this case was identical to that in *Windward Shipping*. Indeed, the same unions were involved and identical signs and literature were used. In both cases, the unions expressly disclaimed any dispute with the foreign vessel and eschewed any violence. Yet, here, as in *Windward Shipping*, the picketing effectively dissuaded longshoremen and other neutral employees from loading or unloading the ship.

On these facts, this Court in *Windward Shipping* reasoned:

> [T]he pickets must have hoped to exert sufficient pressure so that foreign vessels would

> be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. [415 U.S. at 114.]

Thus, if the picketing were successful, the consequential increase in operating costs for foreign vessels "would have more than a negligible impact on [their] 'maritime operations' "—an impact which "would be by no means limited to costs incurred while in American ports." (*Ibid.*) The Court concluded, therefore, that since the impact of the picketing was not "limited to the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate" (*ibid.*), the activity was not subject to regulation by the Labor Board and the state courts were free to intervene.

The same considerations would seem to be dispositive here. To be sure, in our case, those who sought the injunction were neutral American employers, not foreign shipowners as in *Windward Shipping*. But it is not apparent how the character of the state court plaintiff can bring within the ambit of the Labor Relations Act activity which has been held outside it. Accordingly, the proper conclusion would seem to be that, here too, the state courts have exclusive jurisdiction to enjoin the picketing.

2. There is, however, a difficulty in concluding the matter so swiftly. Section 8(b)(4)(B) of the National

Labor Relations Act[1] was enacted to shield innocent third persons from the adverse impact of labor disputes to which they were not privy,[2] and it is difficult to appreciate why the respondents here—American employers and suppliers—should not be free to invoke the Board's aid under that provision.

Thus, here, when longshoremen refused to cross the picket lines to load and unload the foreign vessels, their employers might have wished to seek relief from

---

[1] The relevant portion of the provision, codified as 29 U.S.C. 158(b)(4)(B), is as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *."

[2] See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386–390; *National Woodwork Manufacturers* v. *National Labor Relations Board*, 386 U.S. 612, 624.

the Board. Since the picketing, to the extent that it had secondary effects, "arguably" amounted to a secondary boycott prohibited by Section 8(b)(4)(B),[3] the Board would plainly have jurisdiction to entertain the complaint if the primary dispute did not involve a foreign vessel. It is not apparent why the nationality of the primary employer should make any difference. The secondary pressures brought to bear upon the neutral parties are the same, regardless of the target's nationality. Moreover, since foreign-flag ships carry more than 90 percent of all United States waterborne foreign trade, the secondary aspects of a primary dispute with foreign-flag ships could be widespread, affecting any agricultural producer or manufacturer who depends upon foreign-flag vessels for carrying his goods. If the Labor Board were to lack jurisdiction over these secondary effects, neutral parties far removed from the primary dispute would thereby lose the protection of Section 8(b)(4)(B) of the Act.

On the other hand, the normal rule, where activity is "arguably" prohibited by the National Labor Relations Act, is that state courts are preempted. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. Thus, holding that the Labor Board has exclusive jurisdiction of secondary activity involving American antagonists regardless of the nationality of the primary employer would bring us back to the anomaly that the state courts may or may not enjoin picketing

[3] See *Moore Drydock*, 92 NLRB 547, 549; *Grain Elevator Workers, Local 418* v. *National Labor Relations Board*, 376 F. 2d 774 (C.A.D.C.), certiorari denied, 389 U.S. 932.

depending on the identity of the plaintiff. That result, as we have noted, seems untenable. Accordingly, we suggest a solution that accommodates both concerns.

3. A way to reconcile the competing claims of Section 8(b)(4)(B) and *Windward Shipping* is to recognize that state courts and the Labor Board have concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners. Under this arrangement, Section 8(b)(4)(B) protection would be available to neutral parties regardless of the nationality of the primary target, and the jurisdiction of state courts could be invoked regardless of the identity of the plaintiff.

When the primary dispute is not in "commerce" within the meaning of the Act, the Labor Board need not have exclusive jurisdiction over secondary aspects "arguably" subject to Section 8(b)(4)(B). "*Garmon* * * * does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations * * *." *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103. The preemption doctrine has never been rigidly applied when it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the Labor Board. Congress[4]

[4] See, *e.g.*, Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. 187, which expressly permits anyone injured by a violation of Section 8(b)(4) of the National Labor Relations Act to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, which permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an

and this Court[5] have carved out exceptions to the Board's exclusive jurisdiction. These exceptions "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca* v. *Sipes*, 386 U.S. 171, 180.

Here the application of state law would not operate to frustrate the purpose of the federal jurisdiction. A primary justification for the preemption doctrine—"the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose * * *," *Vaca* v. *Sipes, supra*, 386 U.S. at 180–181—is not applicable to cases where the primary dispute is outside the jurisdiction of the Board. "[E]ven if a § 8(b)(4)(B) violation were present, central

unfair labor practice within the jurisdiction of the Board (see *Smith* v. *Evening News Assn.*, 371 U.S. 195); and Section 14(c) of the National Labor Relations Act, as amended by Title VII, Section 701(a) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 164(c), which permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

[5] See, *e.g.*, *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (libel); *Automobile Workers* v. *Russell*, 356 U.S. 634 (violence); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (mass picketing); *Vaca* v. *Sipes*, 386 U.S. 171 (duty of fair representation).

interests served by the *Garmon* doctrine are not endangered by a state injunction when * * * the workers sought to be organized are outside the regime of the Act." *Hanna Mining Company* v. *Marine Engineers Benevolent Ass'n.*, 382 U.S. 181, 192–193. Since the Labor Board has no jurisdiction over the primary dispute, the Board's only concern is to provide neutral parties with the protection of Section 8(b)(4)(B). The Board need not have exclusive jurisdiction in order to do so. Neutral parties should therefore be free to take advantage of Section 8(b)(4)(B), or to seek injunctive relief in state court.

By the same token, so long as the secondary dispute implicates American employers and American employees, the Labor Board's exercise of concurrent jurisdiction would not undermine *Windward, supra.* Since the Board need only decide whether the secondary effects are prohibited by Section 8(b)(4)(B), concurrent jurisdiction would not "thrust the National Labor Relations Board into 'a delicate field of international relations.'" *International Longshoremen's, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 199. Moreover, the consequences of a Board decision that the secondary pressure violated Section 8(b)(4)(B) would not encroach upon any of the shipowners' prerogatives about which this Court was concerned in *Windward.* A Board decision that the secondary pressure did not violate Section 8(b)(4)(B) likewise would have no effect upon foreign shipowners, since the neutral employers or the shipowners would always be free to seek an injunction in state court.

The Department of State is concerned about the impact of a reversal here upon our relations with other countries. As evidenced by the *amicus* brief for the Government of Liberia, foreign governments are concerned that this Court's decision in *Windward, supra,* might be undermined in the present case. The National Labor Relations Board, on the other hand, is concerned that *Windward* might be extended in the present case to include an area traditionally within the jurisdiction of the Labor Board. We suggest that by providing the Labor Board and state courts with concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners, both concerns may be vindicated.

CONCLUSION

For these reasons, the court below correctly concluded that it was not preempted by the jurisdiction of the Labor Board from entertaining an injunction to end the picketing in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
ROBERT B. REICH,
Assistant to the Solicitor General.

SEPTEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE : 1974

Supreme Court, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC., and ROBERT E. MALONE,

Respondents.

PETITIONERS' REPLY BRIEF

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

TABLE OF CONTENTS

PAGE

Statement 1

Argument

Point I—The dispute is preempted by the National Labor Relations Act 2

Point II—The questions presented by the petition for a writ of certiorari are ripe for adjudication 12

Point III—Petitioners' First Amendment rights have been unlawfully abridged 15

Conclusion 27

TABLE OF AUTHORITIES

Cases:

Alee v. Medrano, —— U.S. ——, 94 St.Ct. 1291 15

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 ..... 15, 21, 21n

Bakery & Pastry Drivers v. Wohl, 315 U.S. 769 (1942) 23n

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 ..... 2, 3, 5, 8, 10, 12

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 ..... 22n

Carlson v. California, 310 U.S. 106 21

Garner v. Teamsters Union, 346 U.S. 485 ..... 5, 6, 8

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 21

Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932 ..... 7, 8

PAGE

Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 12
Hillsborough Township v. Cromwell, 326 U.S. 620 14
Hughes v. Superior Court of California, 339 U.S. 460 22

Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 ..... 3, 12
International Association of Machinists v. Gonzalez, 356 U.S. 617 ..... 25n
International Brotherhood of Teamsters Union v. Hanke, 339 U.S. 470 22
International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 10
International Wood Workers of America (T. Smith & Sons, Inc.), 125 NLRB 209 (1959) 6

Local No. 438 Construction and General Laborers Union v. Curry, 371 U.S. 542 ..... 13, 14
Local Union No. 10, etc. v. Graham, 345 U.S. 192 ..... 16, 17, 20, 21
Local Union No. 25 v. New York, New Haven & H.R. Co., 350 U.S. 155 9

Madden v. Grain Elevator Workers Local 418, 334 F. 2d 1014 (7 Cir.), cert. den. 379 U.S. 967 ..... 7, 8
McCulloch v. Sociedad National de Marineros de Honduras, 372 U.S. 10 ..... 2–3, 12
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 27

N.A.A.C.P. v. Button, 371 U.S. 415 ..... 22n
NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 25

Organization For a Better Austin v. Keefe, 402 U.S. 415 ..... 14, 22, 26

Police Department of the City of Chicago v. Mosley, 408 U.S. 92 21
Pope v. Atlantic Coast Line R. Co., 345 U.S. 739 14

PAGE

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 14

San Diego Building Trades Council v. Garmon, 359 U.S. 236 ..... 5, 6
Schneider v. Irvington, 308 U.S. 147 27
Scofield v. NLRB, 394 U.S. 423 25

Teamsters, etc. v. Vogt, Inc., 354 U.S. 284 ..... 16, 21, 22
Thornhill v. Alabama, 310 U.S. 88 ..... 21, 27

United Mineworkers of America, District 12 v. Illinois State Bar Assn., 389 U.S. 217 ..... 22n

Washington-Oregon Shingle Weavers Council, 101 NLRB 1159 (1952), enforced 211 F.2d 149 (1954; 9 Cir.) 6
Weber v. Anheuser-Busch, Inc., 348 U.S. 468 5
Windward Shipping (London), Ltd. v. American Radio Association, —— U.S. ——, 94 S. Ct. 959 ..... 2, 2n, 3, 3n, 10, 11, 12, 17, 22

Other Authorities:

Alabama Laws, Title 26, Sec. 375(1) *et seq.* Right to Work Law—Declaration of Policy 26n

Constitution of the United States:
First Amendment 15, 16, 20, 22, 25, 27

46 C.F.R. 308:1-308:356 10

46 United States Code:
§1242(a) 10
§1283(a) 10

National Labor Relations Act:
Section 8(a)(3) 24
Section 8(b)(2) 25
Section 8(b)(4) 5, 6, 7, 8
Section 14(b) 26n

Wagner Act 24

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,

Respondents.

PETITIONERS' REPLY BRIEF

Statement

This brief is in reply only to the briefs of respondents and to those of amici curiae timely filed. We were advised telephonically by the Clerk's office on October 2, 1974, that a brief was filed on September 30, 1974 by the Solicitor General of the United States in support of respondents. As of this writing, October 3, 1974, no copy of that brief has been received by the undersigned. When a copy is received, petitioners will file and serve a supplemental reply brief.

ARGUMENT

POINT I

The dispute is preempted by the National Labor Relations Act.

A: Reliance of respondents, American employers and persons engaged in business at Mobile, Alabama, upon *Windward Shipping (London), Ltd.* v. *American Radio Association,* —— U.S. ——, 94 S. Ct. 959, as authority to exclude wholly from NLRB jurisdiction, conduct limited to peaceful picketing and pamphleting of foreign ship owner vessels by American unions requesting non-patronizing of such vessels, and which conduct allegedly, "directed employees of other employers [respondent Association, comprised of American stevedoring employers], to refuse to provide any work or services with respect to such vessels" (respondents' complaints 37a, 47a) is misplaced and in error (respondent Association's Point I).

In *Windward,* foreign ship owners sought state court injunctive relief against the aforesaid peaceful protest picketing and pamphleting. The *Windward* court recognized initially that the union's conduct there[1] did not constitute the type of interference with the foreign vessels' internal affairs, as previously found in *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138[2] or its progeny, *McCulloch*

1. The union parties and activities at bar were part of the same activities as in *Windward;* implementation of an identical program in various seaports of the United States by six national or international American unions representing merchant seamen, protesting the loss of American merchant seamen's domestic employment opportunities to foreign owned vessels and requesting such vessels not be patronized.

2. *Windward,* 94 S. Ct. at 965.

v. *Sociedad National de Marineros de Honduras,* 372 U.S. 10 and *Incres Steamship Co.* v. *International Maritime Workers Union,* 372 U.S. 24, and which led the *Benz* court to conclude that, "the ship owners' action was not preempted by the Labor Management Relations Act," *Windward* 94 S. Ct. at 963. However, the *Windward* court speculated and then concluded, that the effect of the picketing—there an appeal to American firms, their employees and other persons, not to patronize the foreign ship owners' vessels because their substandard wages and working conditions resulted in devastating damage to American merchant seamen's standards and decimation of domestic employment opportunities—would have an adverse impact upon the foreign ship owners and their foreign vessels, which might severely disrupt the maritime operations of the foreign vessels.[3] As a consequence, the *Windward* court concluded that the conduct was within *Benz* parameters, 94 S. Ct. at 965, and held that such foreign ship owners' action was not preempted by the NLRA.[4]

The *Windward* court, in its *Benz* discussion, preliminary to its conclusion based upon the economic impact aforesaid (a preemption or coverage test not previously employed), emphasized that the Act's coverage encom-

3. The *Windward* court speculated that the pickets "must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs * * *," notwithstanding no evidence or finding to support such speculation and on the contrary evidence that the express purpose was to ostracize the vessels—do not patronize.

4. As to analytical and critical comment upon the *Windward* holding and rationale, see Prof. Thomas G. S. Christensen, New York University Law School, Secretary, Section of Labor Relations Law, American Bar Association, address before Section, Hawaii Convention, August, 1974.

passed, "American workers and employees", here in the United States, 94 S. Ct. 963. At bar, the controversy over which the Alabama state courts assumed jurisdiction, and concerning which injunctive relief was granted, is not between American unions and foreign ship owners, but between American merchant seamen, their unions, American workers and the Association, its stevedoring members, American employers at the Port of Mobile, Alabama.[5]

5. The following operative provisions of the Alabama injunction further conclusively demonstrates that the controversy over which Alabama assumed jurisdiction and issued its restraint was between American workers and employers.

1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant Mobile Steamship Association, Inc.

2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for members of Complainant Mobile Steamship Association, Inc.

3. Interfering with the operations of any member of Complainant Mobile Steamship Association, Inc. in any manner whatsoever.

4. Picketing or interfering at or near Complainant Mobile Steamship Association, Inc. and its members' premises or premises used by Complainant Mobile Steamship Association's members in a manner calculated to intimidate Complainant Mobile Steamship Association's members' employees or anyone working in association with the Complainant Mobile Steamship Association's members, or any other person entering or leaving or attempting to enter or leave Mobile Steamship Association's members' premises, or calculated to induce any such persons not to report or apply for work at Mobile Steamship Association's members' premises, or any facility used by Mobile Steamship Association's members.

5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

6. Interfering with the contractual relations existing or to exist between the members of Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile (29a, 30a).

As *Benz* instructs, such a controversy between American workers and employers is fodder for the Act's coffers and as to which states are preempted from exercising jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468. State jurisdiction, opted for by respondents, of a controversy such as at hand, would lead to a variety of diverse regulation of American maritime and waterfront labor relations, particularly where some coastal states' public policy may deem the instant peaceful picketing and pamphleting "truthful and justifiable conduct", not unlawful and subject to restraint, while other coastal states may determine otherwise. In both instances, under respondents' contention, the Act would be inapplicable and a substantial part of American maritime or waterfront labor relations regulation made wholly dissimilar, a result totally contrary to and in repudiation of, Congress' expressed intent of uniform regulation of our Nation's labor relations. *Garner* v. *Teamsters Union*, 346 U.S. 485.

B: The NLRA, Section 8(b)(4),[6] places within the NLRB's exclusive domain the adjudication of conduct by American labor organizations which involves alleged in-

6. Its pertinent part provides:

"It shall be an unfair labor practice for a labor organization or its agents * * * to induce or encourage any individual employed by any person engaged in commerce * * * to engage in, a strike or a refusal in the course of his employment to * * * transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services * * * where in either case an object thereof is * * * forcing or requiring any person to cease * * * handling, transporting, or otherwise dealing in the products of any other producer, * * * or to cease doing business with any other person * * * PROVIDED, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

terference with American employers, not parties to the underlying or primary dispute. For authorities and argument in support of the foregoing, see brief of American Federation of Labor-Congress of Industrial Organizations, Amicus, Point 1(b)(c) pp. 4-12. In the interests of brevity and to avoid repetition, petitioners adopt the aforesaid cited argument. Additionally, it is re-emphasized that respondents in their state court Bills, in the gravamen of their complaints, alleged that petitioners picketed the foreign flag vessels at Mobile (37a, ¶18; 46a, ¶17) and *"also directed employees of other employers and represented by Respondents to refuse to provide any work or service with respect to such vessels"* (37a, ¶19; 47a, ¶18), and that said conduct interferred with respondents' business (37a, ¶¶20, 21; 47a, ¶¶19, 20). That is a typical allegation of "cease doing business" under Section 8(b)(4). Such allegations, involving American unions and employers, fit squarely within Section 8(b)(4)'s parameters—whose adjudication is preempted solely to the NLRB, *Garmon* and *Garner, supra.* The Alabama courts, in assuming jurisdiction of such dispute and issuing the injunction order regulating such activities (fn. 5 *supra*) trespassed upon the NLRB's exclusive domain (fn. 6 *supra*).

Nor does the fact that an underlying dispute may not be within NLRB jurisdiction, oust the NLRB's exclusive competence to pass upon conduct and its impact upon parties who are directly involved or may be affected by the dispute. In *Washington-Oregon Shingle Weavers Council,* 101 NLRB 1159 (1952), enforced 211 F.2d 149 (1954; 9 Cir.), and *International Wood Workers of America (T. Smith & Sons, Inc.)*, 125 NLRB 209 (1959), American unions with affiliates in Canada, had an underlying dispute with non-union Canadian shingle manufacturers. In furtherance of the underlying dispute with the Canadian plants and the shingles manufactured by them, the unions in the United States, at the site of an American employer, engaged in activities prohibited by Section 8(b)(4). Notwithstanding that the underlying dispute was foreign, over which the Board had no jurisdiction, the conduct complained of was domestic, involving American employers and employees, and was consequently within the exclusive authority of the NLRB. So at bar. The underlying dispute between petitioners and the foreign ship owners was held not in or affecting commerce by the *Windward* court, and thus without the NLRB's jurisdiction. Nevertheless the dispute alleged in the complaint between the respondents and petitioners, all Americans and occurring in Mobile, Alabama, and adjudicated by the Alabama courts, is domestic, in and affecting commerce, and within the NLRB's exclusive competence.

Similar to the foregoing are the Courts of Appeal authorities, *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.), cert. den. 379 U.S. 967 and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.), cert. den. 389 U.S. 932, cited and discussed in our main brief, pp. 17, 18 and brief of Amicus AFL-CIO, pp. 6-9. There, the underlying dispute was Canadian involving a Canadian ship owner and Canadian unions, as in *Benz, supra,* not within the Board's competence; the conduct complained of, however, and as to which the NLRB assumed jurisdiction, was domestic, involving American unions, workers and employers, occurring within the United

States and within the interdiction of Section 8(b)(4). Identical thereto is the respondents' complained of conduct at bar; while the underlying dispute is with foreign ship owners, however the acts allegedly engaged in by American unions and workers at Mobile, Alabama involving American employers was within the letter and spirit of Section 8(b)(4). Such dispute is cognizable solely by the NLRB, *Garner, supra.*

Respondent Association's explanation of the dispute in *Grain Elevator* and *Madden, supra* (Association brief p. 22), fails to surface all the facts. As revealed by the NLRB's decision (155 NLRB 402) enforced and/or affirmed by both Circuits aforesaid, and specifically by the Board's Trial Examiner's Intermediate Report, *id.* at 417 *et seq.*, adopted by the Board on the issue present, the Canadian affiliate of an American based union had an underlying dispute with a Canadian ship owner and another Canadian union, as to the representation of seamen aboard Canadian flag vessels. Such dispute resulted in picketing in American ports by the American union and its Canadian affiliate which was thereafter enjoined. Simultaneously the Canadian union requested and induced another American union, the Grain Handlers, not to work upon the Canadian vessels, the subject of the underlying Canadian dispute. Thus, the dispute over which the Board assumed jurisdiction, and concerning which both Courts of Appeals aforesaid held to be within the Act's scope and not under the *Benz* holding and its progeny, was concluded to be a domestic dispute between an American union, the Grain Handlers and its members and their American employer; this notwithstanding that the underlying dispute, into

which the American union of Grain Handlers had injected itself, was not in or affecting commerce and was consequently without the Board's jurisdiction. Again, so at hand. Although petitioners' underlying dispute with the foreign ship owners has been determined by *Windward* to be not "in commerce" under the *Benz* rationale, respondents' complaints, however, allege and constitute a domestic dispute between American unions, employees and employers exclusively within NLRB jurisdiction.

Respondent Association's argument and analysis of the thrust of this Court's holding in *Local Union No. 25* v. *New York, New Haven & H.R. Co.*, 350 U.S. 155, at pp. 20, 21 of its brief, purportedly in reply to petitioners' argument that NLRB exclusive jurisdiction prevails as to other persons or domestic employers, notwithstanding that the underlying object of the union's activities are directed at an entity without the Act's coverage, constitutes a misreading of this Court's decision. The pith, substance and rationale of *Local Union No. 25* was pointedly emphasized in the following:

> "Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. *But we do not think that by so doing Congress intended to divest the N.L.R.B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party.*" (350 U.S. at 160, emphasis supplied)

Similarly, where, as at bar, the underlying dispute is not in or affecting commerce, it does not follow that the NLRB is divested of jurisdiction over controversies *otherwise within its competence.* As we have demonstrated, *supra,* respondent American employers' alleged dispute is with American unions and employees at Mobile, Alabama, conduct exclusively within the NLRA competence.

C: Respondent Association's reply (Association brief pp. 17-9) to petitioners' argument, that *Windward* left unanswered the question of NLRB preemption of union conduct similar to *Windward* with respect to the American-owned vast fleets of foreign flag vessels, registered in Panama, Liberia or Honduras, under a defined category of "effective U.S. control" and which are deemed constructively American, pursuant to American law, 46 U.S.C. §§1242(a), 1283(a) and 46 C.F.R. 308:1-308:536 (petitioners' main brief p. 18 fn.5), misreads the *Windward* rationale.

The *Windward* court, in concluding that the facts there fell under the *Benz* holding (not preempted conduct), rather than under *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195 (preempted conduct), discussed and analyzed the concerns which prompted its conclusion. Such concerns were that "a large scale increase in [the foreign ship owners] operating costs [constitute] more than a negligible impact on [its] maritime operations" (94 S.Ct. at 965) and that,

> "In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute." (94 S. Ct. at 965)

Patently the foregoing underpinning for the *Windward* holding of necessity requires investigation of the facts relative to the foreign ship owner as the competitor who has substantially destroyed the domestic employment opportunities of American merchant seamen. For, if the competitor is not the regularly understood foreign ship owner, but instead an American with a foreign facade, whose foreign vessels under the aforesaid 3-Nations flags are in fact and substance, by virtue of American law, effectively American ships, and if such arrangement is with the knowledge and consent of the aforesaid foreign nations, then certainly, the *Windward* concerns of retaliatory action and probable exacerbation and broadening of the dispute is without substance and ephemeral. Similarly, *Windward* concerns for "private balance sheets of foreign ship owners" would be without basis or justification if it appears that in reality they are American owned major petroleum and multinational corporations engaging in our seaborne trade. We know of no authorities holding, and we do not believe any exist, that the reach of a Congressional Act shall be determined by judicial concern for the financial weal of major private U.S. corporations.

The test for preemption is not that of "balancing of contacts" as respondent Association suggests (Association brief pp. 18, 19). To the contrary, it is the *Windward* court's expressed concerns for the foreign ship owners and the consequences to the foreigner. We reiterate, the test is the foreign identity of the competitor, and the facts surrounding such competitor against which the *Windward* expressed concerns are to be evaluated and their application determined.

As to the Association's contention that *McCulloch, supra,* finally settled the utilization of "balancing of contacts" theory, we cite this Court's recent decision in *Hellenic Lines Limited* v. *Rhoditis,* 398 U.S. 306, where the same contention as that raised here by respondents was raised by the *Hellenic* minority (398 U.S. at 312), but not accepted by the Court.

POINT II

The questions presented by the petition for a writ of certiorari are ripe for adjudication.

Both respondent Association (brief pp. 23-27) and its Amicus, Westwind Africa Line, Ltd. (brief pp. 5, 6), contend that absent final judgment, the questions presented should not be considered. Such contentions are erroneous.

The Alabama Supreme Court in its opinion, premised upon this Court's holdings in *Benz, Incres* and *McCulloch, supra,* concluded that the NLRA was inapplicable, because the case concerns "matters affecting international relations and not properly for NLRB jurisdiction" (14a). Such findings and conclusion of law, notwithstanding that it was contained in an affirmance of a preliminary injunction, is nevertheless final. Such jurisdictional question, determined by Alabama's highest court, "has been finally determined by the judgment below and is not subject to further review in the (Alabama) state courts", *Local No. 438 Construction & General Laborers Union* v. *Curry,* 371 U.S. 542, 549, 550. Consequently, no subsequent hearing on the issuance of a permanent injunction will change such determination in the Alabama trial court.

The requisite finality under 28 U.S.C. §1257 exists, as such judgment constitutes, "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made [as we make in Point I, *supra*], that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board," *Curry,* 371 U.S. 542, 552.

In addition to its final determination of the issue of preemption, the Alabama Supreme Court has determined that the exercise of First Amendment rights by peaceful picketing and pamphleting may be summarily and totally prohibited, pending ultimate, if not delayed, resolution of the issues, solely because of the adverse economic effect of the picketing and pamphleting (19a). Such determination is equally final. Furthermore, the Alabama Supreme Court has determined that the purpose of petitioners was probable wrongful interference with the business of loading and unloading ships (25a, 26a). This was premised solely upon a personal hope of an administrative functionary of

petitioners, to effectuate a personal purpose other than that of the petitioners (126a, 130a). He was without any authority to vary petitioners' specific instructions (142a), but was solely authorized to maintain the picket line in conjunction with others (143a); that personal hope of this individual has now been constituted as the petitioners' purpose and object so as to convert their national lawful picketing purpose and conduct, to one of intended probable wrongful interference with a person's business.

Lastly, the Alabama Supreme Court held that wrongful interference with an Alabama resident's business, notwithstanding the vagueness of the term "wrongful", justifies the total restraint of picketing, of publicizing and/or of informational picketing by labor organizations (20a), cf. *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415.

The totality of the foregoing, aside from preemption, is that "nothing more of substance (is) to be decided in the trial court"—consequently the judgment is final for this independent reason, *Curry, supra* at 550, 551, *Keefe, supra* at 418. In result, the federal questions, "have reached a definitive stop". *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71. Under this posture the controlling question is a federal one with nothing more to be decided below. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 739. Finally, where as here, the Court upon well founded jurisdictional ground has the case before it, it is empowered to decide the entire controversy, *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629.

POINT III

Petitioners' First Amendment rights have been unlawfully abridged.

A: As found by the Alabama Supreme Court, petitioners' mute pickets picketed and distributed pamphlets at the site of the two foreign ship owner vessels at Mobile and then reduced their picketing and pamphleting to one of such vessels, the Liberian vessel AQUA GLORY (6a, 7a). Such direct picketing and pamphleting caused persons not to work upon the picketed vessels. In affirming a temporary injunction the Alabama Supreme Court initially concluded that:

> "We feel the Circuit Court in Mobile County could validly consider the economic effects of the picketing at the particular time the dispute was in progress and issue its order ceasing all picketing until the underlying questions could be resolved without unlawfully interfering with appellants' rights to express themselves on the disputed issue." (19a)

Summarily destroyed upon the altar of economics was petitioners' First Amendment guarantee of free speech, recognized as having such "an important role * * * in labor disputes", *Allee* v. *Medrano*, —— U.S. ——, 94 S.Ct. 2191, 2207, to truthfully and peacefully publicize the issues of a labor dispute and request persons not to patronize the picketed entity, is conduct protected by the First and Fourteenth Amendments, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, 313.

We know of no prior decision of this Court, nor have the Alabama Supreme Court or respondents cited any

decision, which permits a state to so arbitrarily vitiate such constitutional rights as Alabama has done, on the naked ground that there is a "valid state interest in the preservation of its local economy".

This Court in *Teamsters, etc.* v. *Vogt, Inc.*, 354 U.S. 284, concluding that under certain circumstances states may restrain picketing, specifically cautioned:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts no more than state legislatures, can enact blanket prohibitions." (354 U.S. at 294, 295).

By its action aforesaid, Alabama has employed the proscribed procedure of enacting blanket prohibitions preliminary to any investigation resolving the underlying issue as to the picketing conduct or its purposes, and the exercise of most valuable First Amendment rights of American merchant seamen have been unlawfully restrained. Such state conduct, as the foregoing authorities instruct, patently is an abridgment of First and Fourteenth Amendments strictures.

B: At issue is a substantial constitutional claim, the guarantees of the Bill of Rights, the freedom of expression of petitioners and their thousands of American merchant seamen upon an issue of most vital significance to them and the Nation. This Court has the power to search the Alabama state court record to assure that such valuable rights have not been "defeated by insubstantial findings of fact, screening reality". *Local Union No. 10, etc.* v. *Graham*, 345 U.S. 192, 197.

The Alabama Supreme Court (23a, 24a), respondents and their Amici, in support of the injunction, and notwithstanding that there were no findings by the trial court, rely exclusively upon portions of the testimony of the witness Niera, a low-level local administrative representative of one of the six national and international union petitioners.

The reliance is upon his recitation, not of the petitioners' picketing object and purpose, but instead upon his personal hopes and desires so as to "find" the purpose and objects of petitioners' conduct. (Respondent Association brief pp. 34, 35, 44, Amicus Westwind p. 10.) However as *Graham, supra,* mandates, the search of the state court record illustrates the error at bar, for it demonstrates the reality of the events and the absence of any basis for finding that Niera's personal hopes and desires were the Committee's or the petitioners' purposes and object.

As both this record and the *Windward* record demonstrate, the six petitioners, national and international unions, after careful review and deliberation, determined to take specific collective action through a nationwide program to protest the loss of their members' domestic employment opportunities to foreign ship owners' vessels engaged in the carriage of American sea-borne commerce. To that end they formed a Committee and determined their policy, program, object and purpose. (94 S. Ct. at 961, 962, 6a, 7a.)

That Committee prepared the picket signs and leaflets for distribution by mute pickets with specific written instructions which were delivered by Committee representa-

tives to ports where picketing was to be conducted (91a, 107a, 108a, 113a). The instructions (113a) pointedly recited the object and purpose of the petitioners, to wit,

> "Your Union, along with other American Maritime Unions, has formed a Committee, to protest the loss of jobs to Foreign Flag operators transporting American Commerce and who operate such vessels at wages and benefits substandard to those enjoyed by American Seamen.
>
> "In support of this protest, these Unions are setting up publicity picketing around such Foreign Flag Vessels in American Ports.
>
> "Our organization will participate in carrying out this publicity picketing.
>
> "In connection with this activity, if the publicity picketing is to take place in your Port, the following instructions must be followed to the letter.
>
> "1. If the vessel is at a Terminal and access cannot be had alongside the vessel, request must be made to the Terminal operator for the opportunity to picket alongside the vessel. If this request is denied, picketing is to take place at the entrance to the Terminal. Make a memorandum of your conversation with the Terminal operator.
>
> "2. There should be no more than 4 pickets at any one site, at any one time. Pickets must be instructed that all picketing must be peaceful and they must ignore any acts of provocation. Picket signs with the correct language will be furnished to your Port.
>
> "3. Your Port will be furnished with leaflets. All pickets are to carry a sufficient amount of leaflets which they will distribute as they picket. Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet.

> "4. If anyone asks you, as Port Agent, or asks the pickets whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet.
>
> "5. In response to any inquiries, from other Unions, to you or your representative at your Port, refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More. If any of the pickets are served with a legal paper, they are to call your Union Office immediately. They are not to speak to anybody else. In the event legal papers are served, you must notify your headquarters immediately.
>
> "6. Any and all inquiries directed to you from the Press or anybody else, should be referred to your Headquarters. Do not engage in any conversation with such persons.
>
> "7. No one has authority to change these instructions except upon specific written authority from your Headquarters."

Niera's sole function was to carry out the Committee's instructions as a local representative of one of the six petitioners, as the aforesaid instructions made indubitably clear. Admittedly he had "no authority other than I put pickets out on the picket lines in cooperation and in conjunction with the people that work with me" (143a); in fact, as a local official of one of the petitioner unions, he was subordinate to Mr. Chuck Molloy, the local coordinator; that Niera and others were "to receive our instructions, and information comes through Mr. Molloy who acts as the

coordinator for this particular situation we've got here in Mobile" (141a, 142a). Further, admittedly, Niera had no authority to vary petitioners' specific aforesaid instructions (126a, 130a, 142a), which in conjunction with the prepared and authorized picket signs and pamphlets used, made crystal clear that the petitioners' purpose or object was to have the foreign ship owners vessels ostracized—not to be patronized. There was no evidence that the Committee's purpose or object was to "clutter up the port of Mobile—to bring sufficient pressure on the U.S. Government to do something about the American merchant marine or shut the whole State Docks down" (24a). Such was *solely* the personal hopes and desires of Niera, the low-level administrative functionary whose duty and authority was merely to carry out prescribed and limited and perfunctory picketing duties.

The foregoing constitutes the *Graham* task of searching the record. We respectfully submit that nothing contained in Niera's testimony could conceivably constitute substantial or adequate findings as to the petitioners', as distinguished from Niera's personal, purpose and object, so as to warrant or justify abridgment of the exercise of guarantees contained in the Bill of Rights by tens of thousands American merchant seamen. As *Graham, supra,* requires, "guarantees of the Bill of Rights [may not] be defeated by insubstantial findings of fact",[7] a mandate disregarded by the Alabama courts at bar.

C: The Alabama Supreme Court indicates that peaceful and truthful picketing, which wrongfully interferes with a person's business will be restrained. However, as this

7. In fact, the trial court made no findings of fact (20a).

Court has repeatedly stated, picketing is "expressive conduct" within the protective mantle of the First Amendment, *Logan Valley, supra,*[8] *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 99, and when states reach out to regulate such picketing conduct, the exercise must be as a necessary step to the realization of a "valid state policy in a domain open to state regulation," *Vogt,* 354 U.S. at 291. Here, through the use of the term "wrongful interference", without defining with clear and precise enumeration what is wrongful, Alabama has not manifested the necessary allegiance to and protection of, constitutional guarantees of free speech. Such valuable rights and their zealous protection, mandate standards the most exact and clear, before their regulation may be undertaken, *Thornhill* v. *Alabama,* 310 U.S. 88; *Carlson* v. *California,* 310 U.S. 106. Under the determination below, each Alabama trial judge and subject to human predilections, is left to determine whether or not the picketing conduct is wrongful—a result similar and analogous to the prohibited procedures of blanket state prohibitions of peaceful picketing, *Vogt, supra.*

Misplaced is the reliance by the Alabama Supreme Court, respondents and their Amici upon *Vogt, supra,* and

8. To distinguish *Logan Valley,* respondent Association (brief, pp. 35, 36) and its Amicus Westwind (brief, pp. 9, 10) contend that the union picketing there was directed to consumers and not to Union members and confined solely to the pick-up area frequented by customers. The *Logan Valley* record demonstrates otherwise. The *Logan Valley* pickets, carrying picket signs, handed out leaflets reading, *inter alia,* "We appeal to our friends and members of organized labor Not to Patronize this non-union market" (Union brief, p. 7, Record 89, 102), and the picketing took place in the pick-up area and in front of the supermarket (Union brief, p. 5, Record 89), conduct identical to petitioners' pickets at bar. [References to Record and Union brief are to *Logan Valley* record and filed briefs].

this Court's prior decisions in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; *Hughes* v. *Superior Court of California*, 339 U.S. 460; and *International Brotherhood of Teamsters Union* v. *Hanke*, 339 U.S. 470. In each of those cases there was a specifically delineated and defined valid state policy directed at a substantive evil, *e.g.*, monopolistic practices, racial quota hiring, and avoidance of forced union shop provisions. However, at bar, we are advised of no specific Alabama state policy the validity of which can be evaluated by any of the tests approved by this Court. Under the generic postulation, "wrongful", picketing which disturbs the privacy of an Alabama resident's home where he may also be transacting business, may be deemed by Alabama courts as wrongful interference and thus restrained, notwithstanding this Court's recent determination that such a state policy may not be utilized to abridge First Amendment rights, *Keefe, supra*. We respectfully submit, that the mandate that a state may not regulate peaceful picketing, the exercise of a First Amendment right, unless it first demonstrates that it has met in all respects, the aforesaid *Vogt* test of a valid state policy in a domain open to state regulation to correct demonstrated substantive evils,[9] may not be replaced by the vague and casual test opted for by the Alabama courts.

Both respondent Association and its Amicus, *Westwind*, constantly intone the old and as we demonstrate *infra*, the out-moded shibboleth, that a peaceful union picket line constitutes a coercive signal for economic action by union members and is consequently not entitled to the complete

9. *Cf. N.A.A.C.P.* v. *Button*, 371 U.S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217.

guarantees of the First Amendment (Association brief pp. 30-33; Westwind brief p. 7). Such shibboleth is premised upon determinations made more than a score and a half years ago[10] and repeated and paraphrased notwithstanding that experience, legislation, mores and societal evaluations have undergone critical changes so that the underpinning no longer exists for the conclusion that a peaceful picket is a coercive signal.

The concept of a coercive signal was premised upon the development of labor organizations within the framework of then existing legislation and societal views. Unions under the legislative permissiveness of the Wagner Act, strengthened the institution, originally conceived by the craft unions, of the closed shop with the concomitant power to regulate the right of a worker to secure and retain a job. The adoption of union rules or policies with the power to discipline, including the power to force termination of employment, were lawful and not unusual. The administration of such rules and policies were thought to bring about heightened bureaucratic arrogance. It was thought by many that the totality of the foregoing gave to the picket line an economic sanction imposed by bureaucratic forces, thus the euphemism "signal".

We do not necessarily subscribe to the rationale or reasonableness of the view held by many of the significance of the "signal". Other societal views as to institutional values for the Nation might outweigh the alleged coerciveness of the signal. However, such balancing is totally irrelevant to the issue here. Congress, acting upon its

10. *Bakery & Pastry Drivers* v. *Wohl*, 315 U.S. 769, 776, 777 (1942).

experience with the Wagner Act, has cut the ground from under the "signal" doctrine. It has long since been eroded or changed, although the old shibboleth, no longer anchored to its purpose, continues in orbit.

Congress, in amending the Wagner Act, outlawed the closed shop and permitted, subject to state policy, a much lessened degree of union security,[11] and limited the power of unions to terminate an employee's employment or otherwise to discriminate, for reasons other than "failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership".[12]

11. Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employers eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

The alleged coercive effects and bureaucratic powers constituting the underpinning for the signal doctrine no longer exist. An employee's sole obligation as a condition of his employment is solely to meet the regular dues and initiation fee obligations, *Scofield* v. *NLRB*, 394 U.S. 423, 429, fn. 5; *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 196. If the employee is a member of a union and is dissatisfied with union policy and unable to change it, he may exercise his free choice to resign from the union and not be subject to contractual requirements of the union's constitution and by-laws[13] and merely tender the dues and initiation fees, *Allis-Chalmers*, 388 U.S. at 196. In all respects, by the NLRB as amended, the choice to respect or honor another labor organization's peaceful picket line, rests solely with the individual employee's voluntary action. He cannot be coerced. He has a free choice as an individual to determine whether he is in accord with the expressions of the pickets. The picketing then is a fundamental exercise of First Amendment rights; it is an appeal for voluntary action by persons in sympathy

12. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

13. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618.

with the ideas expressed. Most significant, under the amended NLRB,[14] no person in Alabama is required to even make the tender of dues or initiation fees.[15] The alleged predetermined coercion and bureaucratic excesses underlying the signal concept is now totally absent and in place is the purely voluntary action of the individual.

The voluntary action of working people, union members and others[16] who philosophically or economically happen to be in accord with the peaceful protest picketing and the message thus being imparted, such as at bar, is no less a protected exercise of free speech, than when members of a religious order, racial, feminist or similar groups, whose allegiance to or agreement with the group's dogma, impels their action jointly or in conjunction with others, and results in adverse economic impact upon a picketed entity, *Keefe, supra.*

The contrived or now inapplicable rationale to regulate free speech—the "signal" shibboleth—should, we submit,

14. The Act's Section 14(b) provides:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

15. *Alabama Laws, Title 26, Sec. 375(1) et seq. Right to Work Law-Declaration of Policy*—it is hereby declared to be a public policy of Alabama that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. * * *

16. At bar the pickets' message was communicated to all persons, not only union members. In fact union members constitute only a minority of 24.3% of the Nation's almost 89,000,000 working people. See Bureau of National Affairs, August 21, 1973, Daily Labor Report No. 162—Table I of the total labor force and percentage of union members.

be evaluated in light of recent legislation and experience. We further submit that they impel the shibboleth's discard. The "workingman's means of communication", *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, the truthful picket line, limited to the parameters of the dispute, the permissible area of contest open to the industrial combatants, *Thornhill,* 310 U.S. at 103, 104, is protected fundamental exercise of a right guaranteed by the Bill of Rights and inviolate from state regulation. And the fact that the exercise of free speech at such permissible areas causes substantial adverse economic impact does not lessen the First Amendment's protective mantle, *Schneider* v. *Irvington,* 308 U.S. 147, 163.

Conclusion

The decision of the Alabama Supreme Court should be reversed with a direction to dismiss the complaints.

Respectfully submitted,

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

Supreme Court, U. S.
FILED
OCT 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' SUPPLEMENTAL REPLY BRIEF TO BRIEF *AMICUS CURIAE* FILED BY THE SOLICITOR GENERAL OF THE UNITED STATES

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

CITATIONS

	PAGE
Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183	10
Beasley v. Food Fair, —— U.S. ——, 94 S. Ct. 2023	7
Cunard S.S. Co. v. Mellon, 262 U.S. 124	14
Garner v. Teamsters, etc., 346 U.S. 485	10
Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774, cert. den. 389 U.S. 932	5
Hanna Mining Co. v. District 2 MEBA, 382 U.S. 181	6, 7, 8
Hattiesburg Bldg. & Trades Council v. Broome, 377 U.S. 126	4, 5
Lauritzen v. Larson, 345 U.S. 571	11
Local Union No. 25 v. New York, New Haven & H. R. Co., 350 U.S. 155	5
Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014, cert. den. 379 U.S. 967	5
McCulloch v. Sociedad Nationale de Marineros de Honduras, 372 U.S. 10	12n
Motor Coach Employees v. Lockridge, 403 U.S. 274	5, 7
NLRB v. International Longshoremen's Association, 332 F.2d 992 (4 Cir.)	5
NLRB v. San Francisco Labor Council, 475 F.2d 1125	5
Paraiso v. U. S., 207 U.S. 368	2n
Plumbers, etc. Local 298 v. County of Door, 359 U.S. 354	5
San Diego Building Trades Council v. Garmon, 359 U.S. 236	5, 6, 7, 8
Steelworkers v. NLRB, 376 U.S. 492	9
Teamsters Union v. Morton, 377 U.S. 252	8, 9
Wilderhaus' Case, 120 U.S. 1	14
Windward Shipping (London) Ltd. v. American Radio Assn. *et al.*, —— U.S. ——, 94 S. Ct. 959	1, 2, 6, 8, 11, 12n

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' SUPPLEMENTAL REPLY BRIEF TO BRIEF *AMICUS CURIAE* FILED BY THE SOLICITOR GENERAL OF THE UNITED STATES

In this case, as in *Windward* v. *American Radio Assn.*, —— U.S. ——, 94 S. Ct. 959, the United States, without prior notice, and without even seeking the Court's leave, has filed a brief *amicus curiae,* so far out of time that it is necessary for us to impose on the Court by filing a supplemental brief to reduce the Government's unfair advantage.[1]

1. In *Windward* the Government filed its memorandum supporting the petitioner foreign flag ship 105 days out of time and six days before oral argument. Here its brief supporting the respondents longshoring association and farmer, is filed 54 days out of time and approximately two weeks prior to argument. While in *Windward* the Court declined to act on the Union's motion to strike the Government's brief, in light of the fact that such late filings are now apparently routine rather than exceptional, we believe it appropriate to move once again that the Government's untimely brief be stricken.

1. The premise upon which the Government rests its argument is that "[e]xcept in one important respect—the character of the complaining party—this case is identical to *Windward supra*" (Gov. Br. p. 2); and the proffered conclusion drawn from that premise is that while "in our case, those who sought the injunction were neutral American employers, not foreign shipowners as in *Windward* * * * it is not apparent how the character of the state court plaintiff can bring within the ambit of the Labor Relations Act activity which has been held outside it" (Gov. Br. p. 6).

We had thought that no law student passed the first year without learning that out of a single factual matrix a number of causes of action may arise, some meritorious and others not, and some within the jurisdiction of a particular tribunal and others outside that court's reach. And, we are certain that only an "intelligence fired with a desire to pervert"[2] could have misinterpreted our brief to assert that it is "the character of the state court plaintiff" (Gov. Br. p. 6) rather than as was actually argued, the gravamen of the complainant's cause of action and the state court's rationale, that requires the conclusion that this case is within the exclusive primary jurisdiction of the NLRB.

(a) In *Windward*, foreign flag shipowners filed a state court action "asking the court to enjoin the picketing [there] as tortious under Texas law. The primary basis for [the ships'] claim was that the picketing sought to induce the owners and crews to break pre-existing contracts" (94 S.Ct. at 962). This Court held that the NLRA as amended did not deprive the state court of jurisdiction to decide that claim since the Act is "unrelated to maritime

2. *Paraiso* v. *U. S.*, 207 U.S. 368, 372 (Holmes, J.).

commerce and directed solely at American labor relations" (*id.* at 964).

As the Government says, the instant case also "involve[s] picketing of a foreign vessel by American unions, calling attention to the adverse consequence for domestic seamen of the lower wages paid foreign seamen, and asking all those in a position to do so to boycott the foreign vessel" (Gov. Br. p. 5). But here, in contrast to *Windward*, the claim made was *not* that the picketing sought to induce the "[foreign flag] owners and [foreign] crews to break pre-existing contracts" (*cf.*, 94 S.Ct. at 962). The injunction framed by and granted to the American stevedoring companies that are members of the Association regulates the Association's employer-employee relationship with its American employees rather than the employer-employee relationship between a foreign flag ship and its crew. (App. pp. 29a-30a.) Thus, the Supreme Court of Alabama did not purport to define the comparative rights of the picketed foreign flag ship, which is not even a party to this cause, and the Unions. In other words, this lawsuit and the resulting injunction are "directed solely at American labor relations" (*cf.*, 94 S.Ct. at 964).

Thus, the point which the Government argues is pivotal—that the Union's underlying dispute was with a foreign flag shipowner—was not even addressed on the merits by the Alabama courts. Instead, the Alabama courts proceeded to resolve the only controversy before them—the discrete dispute between the Association on the one hand and the the Association's employees and the Unions on the other, all of whom are Americans—just as it would have resolved such a dispute between those parties if the picketed ship, too, had been American.

(b) If the picketed ship had been American there could be no doubt that the Alabama courts had no jurisdiction to issue the injunction that was issued here. That would be true even if the picketed American flag ship was not "in commerce" for purposes of the NLRA because, for example, it did not do enough business to meet the Board's jurisdictional standards. That is the lesson of *Hattiesburg Bldg. & Trades Council* v. *Broome*, 377 U.S. 126 where this Court stated:

> "After finding that the primary employer was not in commerce and ruling that the pre-emption rule of San Diego Building Trades Council v. Garmon, 359 U.S. 236, was therefore not applicable, the state court enjoined picketing at the premises of the secondary employer. The judgment must be reversed. The jurisdictional standards established by the National Labor Relations Board (see 23 NLRB Ann Rep 8 (1958) may be satisfied by reference to the business operations of either the primary or the secondary employer. Truck Drivers Local No. 649, 93 NLRB 386; Teamsters Local No. 554, 110 NLRB 1769; Madison Bldg. & Const. Trades Council, 134 NLRB 517. Here, as the record clearly shows, the secondary employer's operations met the jurisdictional requirements. Since the union's activities in this case were arguably an unfair labor practice, Sailors' Union of the Pacific, 92 NLRB 547, the state court had no jurisdiction to issue the injunction. San Diego Building Trades Council v. Garmon, 359 U.S. 236; Construction Laborers v. Curry, 371 U.S. 542. Accordingly, the petition for certiorari is granted and the judgment is reversed." (*Id.* at 126-127.)

The present case with its allegations of conduct within §8(b)(4)'s purview and involving American employers and unions, is but another example of the Congressional scheme

of the NLRA's exclusive jurisdiction over the alleged misconduct, notwithstanding the underlying, primary or causative dispute, is without the Act's scope; e.g., where the primary or causative dispute involved foreign flag shipowners, *NLRB* v. *International Longshoremen's Association*, 332 F.2d 992, 995 (4 Cir.); *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7 Cir.); *Grain Elevator Workers Local 418* v. *NLRB*, 376 F.2d 774 (D.C. Cir.); and where the primary or causative dispute involved a railroad, *Local Union No. 25* v. *New York, New Haven & H.R. Co.*, 350 U.S. 155; and where the primary or causative dispute involved a governmental entity, *Plumbers, etc. Local 298* v. *County of Door*, 359 U.S. 354; and where the primary or causative dispute involved an agricultural enterprise, *NLRB* v. *San Francisco Labor Council*, 475 F.2d 1125 (9 Cir.) enforcing 191 NLRB 261.

Pursuing the Solicitor General's unusual argument, that because the underlying dispute is not within the NLRB's exclusive province and therefore, all effects of the dispute inclusive of secondary effects are within the jurisdictional competence of state courts, would not only legislatively repeal the Congressional scheme embodied in the Act, it would equally reverse each of the foregoing authoritative holdings and their manifold progeny.

And, while, since the *Broome* decision questions have been raised in the Court as to the application of the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, "to conduct arguably *protected* under §7" and not arguably prohibited by §8 (*Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 325-328; White, J., dissenting; emphasis added), there has been no disagreement since

Garmon, that *Garmon* correctly states Congress' intent insofar as it holds that a complaint seeking injunctive relief which in substance charges a union with an arguable violation of §8 of the NLRA, and which does not rest either on an alleged breach of a collective agreement or on violence by the union, is within the exclusive primary jurisdiction of the NLRB. Indeed, that holding has repeatedly been unanimously followed. And the instant case, of course, falls within that holding since the complaints herein, in essence, plainly allege a secondary boycott arguably prohibited by §8(b)(4).

(c) To be sure, the conclusion that the Alabama courts do not have jurisdiction to apply state law to the secondary boycott claim made by the Association does not, as we have recognized throughout, lead to the further conclusion that the Alabama courts do not have jurisdiction to apply state law to a claim filed by a true foreign-flag ship,[3] that "the picketing sought to induce (foreign) owners and (foreign) crews to break pre-existing contracts" and on that basis is "tortious under [Alabama] law" (*Windward*, 94 S.Ct. at 963), simply because the Union against whom the state court suit is brought argues that its picketing is also a violation of §8(b)(4).

In *Hanna Mining Co.* v. *District 2 MEBA*, 382 U.S. 181, 192-94, this Court affirmed state court jurisdiction over a suit brought by *Hanna* that "alleged that MEBA was picketing Hanna's vessels * * * with the * * * improper aim * * * under Wisconsin law * * * of forcing its representation on unwilling engineers" (id. at 187) and rejected, inter

3. Cf. Un. Br. p. 18, fn. 5.

alia, MEBA's argument that the suit was preempted because the picketing "exerted secondary pressure, arguably violating §8(b)(4)(B)" (id. at 191). As Mr. Justice Harlan, who also wrote the *Lockridge* opinion which reaffirmed *Garmon* there recognized, the *Garmon* doctrine does not divest the state courts of their jurisdiction over claims that picketing that is not even arguably protected by federal law, is tortious under state law, merely because the union raises such a defense. In other words, the states do have jurisdiction to enforce state laws directed to employer-employee relationships not regulated by federal law even though the particular conduct in question may have secondary consequences on employer-employee relationships that are governed by the NLRA. For, extension of *Garmon* to such case would frustrate the state in enforcing its law since the state court would thereby be deprived of jurisdiction, and since the Board could not "reach the volatile core of the conduct"—viz., in *Hanna* the primary picketing prohibited by state law (see 382 U.S. at 194).

The eminently sensible result reached in *Hanna* was "not [a] retreat from *Garmon*." 382 U.S. at 194. (See also *Lockridge*, 403 U.S. 274). The Government seeks to transform it into one by its mental gymnastics unsupported by authority. *Hanna* does not support the Government's novel construct. As we have just seen, the complaint there was predicated on the unprotected primary picketing's illegality under state law, and was therefore outside the Board's competence. That is the reason that complaint had to be dealt with in state court or not at all. And the fact that the focus there was on the employer-supervisor relationship not regulated at all by the NLRA (see also *Beasley* v. *Food Fair*, —— U.S. ——, 94 S.Ct. 2023) assured

that "there was wholly absent the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." (382 U.S. at 194.) In both of these critical respects *Windward* was identical to *Hanna*.

But here the complaint is simply that the unions were guilty of a secondary boycott against American employers. That is the type of claim that Congress has dealt with "comprehensively, and with great particularity [has] 'describe[d] and condemn[ed] specific union conduct directed to specific objectives,' " but not others, and, as to which, Congress has determined that those who enjoy the protection of §8(b)(4) are both limited to the recovery of actual damages, and to securing injunctive relief through the NLRB. (*Teamsters Union* v. *Morton*, 377 U.S. 252, 258-261.) Thus, there can be no doubt that if the Association is remitted to the exclusive authority of the Board, that agency has the power "to reach the volatile core of the conduct" (*Hanna*, 382 U.S. at 194) and to afford the complaining party the full relief Congress has decreed. Moreover, because the focus of this case is on an employer-employee relationship (that between the Association and its longshoremen employees) regulated in its entirety by the NLRA, here, as opposed to *Hanna* and *Windward* the "greatest threat against which the *Garmon* doctrine guards, the State's prohibition of conduct that the Act indicates must remain unhampered" is not "wholely absent," it is clearly present. The injunction issued in this case does not simply govern picketing against foreign flag ships, it prohibits,

> all picketing "at or near [the Association] premises"; "any interfer[ence] by words or actions [with] any person or persons working for [the Association]"; "interfering with the operations of [the Association] in any manner"; "picketing directed at vessels with whom [the Association has] contractual relations"; and "interfering with the contractual relations existing or to exist between [the Association] and • • • vessels calling at the Port of Mobile.",

even though the Act protects such interferences where they are simply the outgrowth of primary disputes with domestic employers. (See, e.g. *Steelworkers* v. *NLRB* (*Carrier Corp.*), 376 U.S. 492.)

In short, the Government is entirely wrong when it argues, relying on *Hanna*:

> "Since the Labor Board has no jurisdiction over the primary dispute, the Board's only concern is to provide neutral parties with the protection of Section 8(b)(4)(B). The Board need not have exclusive jurisdiction in order to do so. Neutral parties should therefore be free to take advantage of Section 8(b)(4)(B), or to seek injunctive relief in state court." (Gov. Br. p. 11.)

Section 8(b)(4) does not merely state a prohibition, it delineates a careful compromise between the interests of unions, neutral employers, and the latter's employees. (See, e.g. *Carrier*, 376 U.S. 496; *Morton*, 377 U.S. 252.) The Board's "only concern is [not] to provide neutral parties with the protection of Section 8(b)(4)(B)," it is to protect the interests of all three in accord with Congress' commands. "The Board [must] have exclusive jurisdiction in order to do so." (cf. Gov. Br. p. 11.)

2. While the Solicitor General denominated his proposal as one granting concurrent jurisdiction (Gov. Br. p.

9), it is much more than that. It would grant to state courts separate and equal and independent jurisdiction to determine under state law, without regard to prior or later determinations by the Board,[4] labor disputes which the Solicitor General acknowledges are now within the exclusive domain of the Board. They are now within that exclusive domain not because of any judicial "accommodation", not because preemption is a judicial invention, but because Congress so intended by Section 10(a) of the NLRA, *Garner* v. *Teamsters, etc.*, 346 U.S. 485; *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, 187.

Furthermore, the Norris-LaGuardia Act, 29 U.S.C. §§101-115, with its general proscription of federal judicial authority to issue injunctions in labor disputes to private parties, would be brazenly frustrated by the substitution of the Solictor General's proposed concurrent jurisdiction to state courts by enabling the latter to issue such injunctions to private parties over the same conduct and its regulation which by Sections 10(a), (e), (f), (j-m) of the Act, Congress by its scheme made enforceable only in federal courts.

Additionally, the specific delineated Congressional scheme embodied in the proviso[5] to the Act's Section 10(a)

4. Under the Solicitor General's proposal, decisions of this Court determining certain labor conduct to be protected by the Act, would be undermined by possible state court decisions applying state law to the same conduct, and which determination would not be further reviewed, there being no federal question involved, merely state law.

5. "Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

of not ceding to state authorities the NLRB's jurisdiction, unless such state authorities' laws and their application, are not inconsistent respectively with the Act and the NLRB, would be patently violated by the Solicitor General's proposals containing no requirement as to consistency of the state bodies' laws and their application.

The Solicitor General's conduct here, brings into focus and equally applicable, Mr. Justice Rehnquist's reference in *Windward* to this Court's *Lauritzen* v. *Larson*, 345 U.S. 571, direction that,

> "* * * this Court rejected a 'candid and brash appeal' made by the seamen and various *amici* that the Court should 'extend the law to this situation as a means of benefiting seamen and enhancing the cost of foreign ship operation for the competitive advantage of our own.' 345 U.S. at 592. We observed at that time that such arguments were obviously better directed to Congress." 94 S.Ct. at 964, fn. 13.

Similarly, the Solicitor General should direct his "candid and brash appeal", his proposals, to Congress, not this Court.

3. The Solicitor General's argument for his proposed most drastic amendments of the NLRA is premised fundamentally upon a subjective and unsupported appeal over concern for the Nation's economy, trade, water-borne delivery of petroleum products and relations with foreign countries (Gov. Br. pp. 2, 12). Significantly, nothing in the record of this case or factual documentation in the Solicitor General's brief supports such concerns, other than the subjective orations. Candid, but nevertheless brash appeals

for amending the NLRA should better be directed to the proper body, Congress, rather than to this Court.[6]

Petitioners' appeal, directed to the public, truthfully and openly proclaimed the substandard conditions of the picketed foreign ship owners' vessels transporting American sea-borne commerce and the dire consequences to the American merchant seamen's domestic employment opportunities with the appeal: "Please do not patronize these vessels. Help the American seaman" (6a), and concurrently—"Please Patronize American Flag Vessels, Save Our Jobs, Help Our Economy And Support Our National Defense By Helping To Create A Strong American Merchant Marine" (7a). Such request for non-patronization of the foreign flag owners' vessels and preferential use of American flag vessels constitutes the basis for the Solicitor General's expressed subjective concerns regarding adverse impact upon our economy, trade and relations with foreign countries. However, most critical is the fact that such concerns and the alleged dire consequences have most recently been expressed to Congress, the proper forum, by the Solicitor General's client, the State Department, with respect to legislation establishing cargo preference for American vessels with American seamen, an objective and purpose comparable to petitioners' picketing. And, most significant, such expressed concerns were not found meritorious but on the contrary, were apparently rejected by Congress, as witness its action on the legislation.

Two bills entitled, "Energy Transportation Security Act of 1974," S. 2089 and H.R. 8193 require that up to

6. *Windward*, 94 S. Ct. at 964 fn. 13; *McCulloch* v. *Sociedad Nationale de Marineros de Honduras*, 372 U.S. 10, 22.

30% of all United States oil imports be carried on United States flag vessels. Extensive hearings were held in 1974 concerning this proposed cargo preference act.[7] The State Department's representatives, both in writing and in person, opposed its enactment, expressing their concerns that the legislation would have, "serious adverse foreign, economic and domestic consequences which would result from the enactment of the cargo preference legislation";[8] "* * * the adverse repercussions * * * on our international relations" and "* * * adversely affect our national security."[9] That the national economy would be adversely affected.[10] And finally, such legislation would cause foreign retaliation and exacerbate substantial foreign relations and possibly contravene treaty relations.[11]

Notwithstanding the State Department's presentation, which almost without exception, tracks the Solicitor General's expressed concerns here, both Houses rejected such argument by their overwhelming votes of 266 to 136 in the House and 42 to 28 in the Senate in favor of the bills. As of this writing, House and Senate conferees have concluded the resolution of differences in their bills, and the House has adopted the conferees' report, with Senate action upon such report awaiting the Senate's return from its recess. Most significant is the undisputed fact that the fears ex-

7. Energy Transportation Security Act of 1974; Hearings Before the Sub-Committee on Merchant Marine of the Committee on Commerce, United States Senate, Ninety-Third Congress, Second Session on S. 2089 and H.R. 8193, Serial No. 93-81, U.S. Government Printing Office. For Hearings in the House of Representatives on H.R. 8193 see Un. Br. p. 18, fn. 5.

8. Senate Hearings p. 13.

9. *Ibid.* p. 13.

10. House Hearings p. 149.

11. *Ibid.* pp. 150, 151.

pressed by the Solicitor General have been recognized by the State Department as matters exclusively the concern of Congress and not the courts, as witness that Department's extensive representations and testimony before Congress. Equally significant, is that the State Department, having been unsuccessful in its efforts before the legislative branch, is now apparently engaged in forum shopping in the hope that this Court will accord their concerns a more hospitable reception than was accorded them by Congress.

Finally, the Solicitor General's reliance upon Republic of Liberia's brief *amicus* as an example of the effect of the domestic dispute upon Liberian registered vessels (Gov. Br. p. 12), is demonstrably superficial when contrasted to realty. The brief *amicus* of that nation is devoted to the frivolous argument that petitioners' acts violate a treaty. (*Wilderhus' Case,* 120 U.S. 1; *Cunard S.S. Co.* v. *Mellon,* 262 U.S. 124.)

As demonstrated by the hearings on the above oil cargo preference bill,[12] Liberia has, for token payment, afforded American owned major petroleum and multinational corporations, its flag as a refuge. It is undisputed that such vessels, with Liberian agreement and consent,[13] are constructively American vessels,[14] although they comprise a major portion of the Liberian registered vessels.[15]

12. Un. Br. p. 18, fn. 5.

13. Senate Hearings, *ibid.* pp. 25, 26.

14. fn. 12 *supra.*

15. Some of the major American owned petroleum companies and American owned multinational companies are: Alcoa Steamship Company, Inc., American International Oil Company, Atlantic Richfield Company, Bethlehem Steel Corporation, Chevron Shipping Company, Cities Service Tankers Corp., Exxon Corp., Getty Oil Company, Gotaas-Larsen, Inc., Gulf Oil Corporation, Marine Transport Lines, Inc., Mobil Oil Company, National Bulk Carriers, Inc., Phillips Petroleum Compay, Texaco, Inc. and Union Oil Company of California (House Hearings, *ibid.* p. 606).

It distorts reason, logic and experience to conclude that a domestic dispute as alleged by respondents, to wit, that petitioners' pickets interfered with American stevedoring business and operations, may adversely affect relations with Liberia because of the alleged effect of such dispute upon American citizens owned and constructively American vessels under effective American control, which are incidentally registered in Liberia. Controlling, however, is the fact that this concern for the protection of such "relations," has been presented to and rejected by Congress.

Conclusion

The Solicitor General's brief should be stricken. In any event, the Court below was in error in concluding that it was not preempted by the NLRA from entertaining the issues.

Respectfully submittted,

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York